95-1243

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW.

1. May the government force a defendant to forego one Fifth Amendment protection (self-incrimination) to preserve another (double jeopardy)?

2. May a defendant facing a parallel 21 U.S.C. § 841, et seq. criminal drug prosecution and punitive 21 U.S.C. § 881 civil forfeitures be given a "Hobson's choice"[1] and forced to make, at the 19 U.S.C. § 1609 administrative level, formal, unprotected admissions and claims of ownership of highly incriminating property so as to abrogate his Fifth Amendment privileges and provide a crucial linchpin in the government's criminal case, or be deemed to have "voluntarily abandoned" said property and thus forego his right to protection against double jeopardy and multiple or successive punishments and prosecutions under United States v. $405,089.23 United States Currency, 33 F.3d 1210 (9th Cir. 1994), amended, 56 F.3d 41 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996); United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996); Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994); Austin v. United States, 113 S. Ct. 2801 (1993); and United States v. Halper, 490 U.S. 435 (1989)?

3. Given said Hobson's choice, may a defendant who is forced to forego administrative claims, be deemed to have waived or forfeited a basic constitutional right such as double jeopardy after the fact with: (a) no showing of a knowing waiver or notice to defendant or counsel of the jeopardy consequences of not contesting the forfeiture, (b) inadequate procedural safeguards, or (c) no showing of voluntary choice?

4. Can an appellate court de novo disturb the lower

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[1]The term Hobson's choice derives from the practice of Thomas Hobson (died 1631), an English liveryman, who required every customer take the horse nearest the door (1649): an apparently free choice when there is no real alternative. Webster's Ninth New Collegiate Dictionary, c. 1990.

court's factual findings, which were not clearly erroneous and which were supported by affidavits of Mr. Plunk and his counsel, that there was no abandonment of property or forfeiture or waiver of Fifth Amendment double jeopardy protection due to the Hobson's choice presented by then-existing law as to inapplicability in administrative forfeiture proceedings of the "limited use immunity" doctrine of Simmons v. United States, 390 U.S. 377 (1968)?

5. Given the government's tactical decision to implement a 21 U.S.C. § 841, et seq. criminal drug prosecution and parallel 21 U.S.C. § 881 punitive civil forfeiture proceedings, obtaining specific 19 U.S.C. § 1609(b) judgments adjudicating Mr. Plunk as owner and forfeiting his property, and arguing at detention hearings and specifying in the grand jury indictment that certain property was incriminating and belonged to Mr. Plunk, is the government precluded by the doctrines of estoppel and res judicata from denying that Mr. Plunk was the owner of the forfeited property and that he therefore suffered prior forfeiture and punishment so as to preclude further prosecution?

6. Did Simmons v. United States, 390 U.S. 37 (1968), hold "limited use immunity" applies to civil forfeiture proceedings; and if not, has any authority binding in the Ninth Circuit so held prior to the Ninth Circuit's holding in United States v. Cretacci, 62 F.3d 307, 311 (9th Cir. 1995)?

7. Should the Simmons "limited use immunity" doctrine now be extended to protect admissions and claims of ownership made by a property owner and defendant in punitive forfeiture proceedings under 19 U.S.C. § 1609 and 21 U.S.C. § 881?

8. If such Simmons "limited use immunity" is now so extended, can the new rule of law establishing same and the companion holding of implied "voluntary abandonment," forfeiture, and waiver of double jeopardy by failing to file a claim be applied retroactively to Mr. Plunk and others similarly situated who relied in good faith on the "old law" to their detriment?

9. Does it violate fundamental fairness and due process of law to force a defendant to forego a defense to punitive administrative forfeitures to preserve Fifth Amendment privileges based upon existing law and then, based on a change in the law, retroactively deny double jeopardy protection notwithstanding said prior punishments?

10. Given the grant of certiorari in $405,089.23 and Ursery, should this court simultaneously grant certiorari in the instant matter, in United States v. Baird, 63 F.3d 1213 (3d Cir.), petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995), and in United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), reh'g en banc denied November 15, 1995,[2] so as to foreclose the government from gaining the precise improper and unconstitutional tactical advantage and result precluded, i.e. punitive deprivation of one's property without jeopardy consequences or meaningful due process of law via exploiting the "Hobson's choice" presented by parallel prosecutions which force a defendant to "fight on two fronts"?

11. Was is improper for the Ninth Circuit, in Plunk and Cretacci,[3] to blend the first half of 19 U.S.C. § 1609(a), which addresses when one can declare property as to which "no...claim is filed...forfeited," with the second half of § 1609(a), which authorizes property that is already forfeited to be disposed of in the "same manner as merchandise abandoned to the United States," so as to manufacture a finding of voluntary abandonment?

12. Given the factual basis for the indictment, does a double jeopardy bar to further prosecution of Mr. Plunk for the conspiracy and distribution counts due to prior punishment for same via punitive forfeitures also bar prosecution for the continuing criminal enterprise and telephone counts under the lesser included-same offense doctrine?

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[2]Counsel is informed Mr. Cretacci's counsel will soon file a timely Petition for Writ of Certiorari.

[3]See Cretacci, 62 F.3d at 310; United States v. Plunk, Memorandum Opinion at 1-2 (9th Cir. Oct. 17, 1995).

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Petitioner, Gerald Frank Plunk, respectfully prays a Writ of Certiorari issue to review the judgment and opinion herein of the United States Court of Appeals for the Ninth Circuit.

IV. REFERENCE TO OPINIONS IN THE CASE.

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was rendered in an unpublished memorandum opinion filed October 17, 1995 in Ninth Circuit Nos. 94-30421 and 94-30422. (Appendix (hereinafter "App.") 1). Petitioner's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied December 14, 1995. (App. 29.) The Honorable John W. Sedwick's unpublished findings and conclusions were entered November 17, 1994 in United States District Court Alaska Case No. CR-94-036-01 (JWS). (App. 4-15.) Magistrate Judge John D. Roberts' unpublished Recommendations were entered November 4, 1994 in No. CR-94-036-01 (JWS). (App. 16-28.)

V. GROUNDS FOR JURISDICTION.

This Court has jurisdiction to issue a Writ of Certiorari under 28 U.S.C. § 1254. The Petition is timely as the initial Judgment and Opinion was filed October 17, 1995; a timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied December 14, 1995.

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

The case involves the Fifth Amendment of the United States Constitution, 19 U.S.C. § 1609, 21 U.S.C. § 841, et seq., and 21 U.S.C. § 881, et seq. The text of same and related jurisdictional statutes and procedural rules are set out in the Appendix at pp. 32-46.

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

This petition seeks review of the Ninth Circuit's opinion

in Cause No. 94-30421, an appeal by the government pursuant to 18 U.S.C. 3731, which reversed and remanded the trial court's final order which granted in part petitioner's motion to dismiss the indictment on grounds that punitive administrative forfeitures of his property constituted prior "punishments" for Fifth Amendment double jeopardy purposes precluding subsequent criminal prosecution for the same underlying criminal offenses. The opinion also dismissed as moot petitioner's interlocutory appeal in Cause No. 94-30422 taken pursuant to 28 U.S.C. § 1291 and Abney v. United States, 431 U.S. 651 (1977), which had sought such reversal insofar as the trial court, only partially granted Mr. Plunk's motion to dismiss, yet specifically found Mr. Plunk had been previously punished by punitive forfeiture of his property based upon certain criminal offenses, including the conspiracy and distribution counts under 21 U.S.C. § 841, et seq. Given the manner in which the indictment was pled, the Count I conspiracy was a lesser included of the Count II continuing criminal enterprise under Jeffers v. United States, 432 U.S. 137 (1977).[4] The district court had jurisdiction pursuant to the double jeopardy clause of the Fifth Amendment, 21 U.S.C. § 841, et seq., and Art. III, § 2, cl. 1 of the United States Constitution.

A. The Various Crimes And Conduct Alleged.

Several related allegations against Mr. Plunk included:[5]

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[4]The district court misapplied the Blockburger and Dixon "same offense" test. Further, utilizing the "factual allegation of the charging documents" analysis of Dixon, as discussed in United States v. Liller, 999 F.2d 61, 62 (2d Cir. 1993), the telephone counts also included as lesser included offenses, the jeopardy-barred Count 1 conspiracy and Count 9, 10 and 11 distribution offenses. See United States v. Dixon, 113 S. Ct. 2849 (1993); Jeffers v. United States, 432 U.S. 137 (1977); and Blockburger v. United States, 284 U.S. 299 (1932). Moreover, the factual basis for the seizures and forfeitures under the search warrant affidavit included the telephone offenses. (App. 90.)

[5]See indictment of 3-22-94 (App. 85-86), superseding indictment of 4-26-94 (App. 70-84), Judge Sedwick's order (App. 4-15) and Magistrate Roberts' recommendations (App. 16-28).

a. Conspiracy alleged in the one-count indictment of 3/22/94 "to distribute cocaine in Alaska from the 'Fall of 1987 until no later than April, 1991' in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the 'Alaska I conspiracy')" (App. 85-86);

b. Allegations in Count 1 of the superseding indictment of 4/26/94 of conspiracy with co-defendant Pierson and other persons "to transport cocaine shipped from Colombia across the 'Lower 48' states of the Union from April 1, 1993 in violation of 21 U.S.C. § 841(a)(1) and § 846 (the 'Lower 48' conspiracy)" (App. 71-76);

c. Allegations in Count 2 Mr. Plunk engaged in a "continuing criminal enterprise from about April 1993 through December 1993 in violation of 21 U.S.C. § 848." (App. 76-80.) Given the factual allegations, including the first of the continuing series of violations alleged at pages 10 through 12, this count includes as a lesser included offense the "Colombian/Lower 48 Conspiracy" of Count 1;

d. Allegations in Counts 3, 4, 5 and 6 Mr. Plunk used a "communications facility to facilitate drug trafficking in violation of 21 U.S.C. § 843(b)" (App. 80-81);[6]

e. Allegations in Counts 9, 10 and 11 Mr. Plunk distributed cocaine in violation of 21 U.S.C. § 841(a), also alleged as overt acts of the "Colombian/Lower 48 Conspiracy" in Count 1, as specified at ¶¶ D.1-20, and alleged as violations in furtherance of the continuing criminal enterprise in Count 2 as specified at ¶¶ A.2-9[7], such distribution counts also allegedly facilitated in telephone counts 3 through 6; and

f. Allegations in Count 12 of conspiracy to "distribute cocaine in Alaska from the Fall of 1980 until December 31,

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[6]Given the factual allegations in Counts 3-6 of facilitating a conspiracy to distribute cocaine and distribution of cocaine, and further, specific allegations in Section A, Count 2, ¶¶ 2, 4, 5, 6, 7, 8 and 9 (continuing criminal enterprise violations referencing phone counts and distribution counts), Count 1, Section D, ¶¶ 1-20 (overt acts of distribution and phone calls as to conspiracy), and in the distribution Counts 9, 10, and 11 as to dates and quantities, said telephone counts include as lesser included offenses (i.e. necessary elements) the "Colombian/Lower 48 Conspiracy" and distribution of cocaine offenses in Counts 1, 9, 10 and 11 allegedly facilitated.

[7]See App. 82-83, 74-76, 77-78.

1993 (the 'Alaska II' conspiracy)." (App. 83-84.)

B. Mr. Plunk's Indictment And Arrest, Search Of His Home, Seizures And Forfeitures Of His Property And Resulting Prior Punishments.

Mr. Plunk was arrested March 25, 1994 on a warrant issued under the original indictment, the "Alaska I conspiracy." On March 22, 1994 the government obtained a search warrant based on DEA Agent Cayford's affidavit (App. 87-91), with searches and seizures of Mr. Plunk's property from his home on March 24, 1994. (App. 7.) Mr. Plunk was detained at detention hearings of 3-30-94, 4-22-94, and 5-9-94 before Magistrate Roberts. (App. 17-22.) A superseding indictment was returned on 4-26-94. (App. 70-84.)

The government made a tactical choice, in violation of Halper, Austin, Kurth Ranch, $405,089.23, and Ursery, to "force a fight on two fronts," via a 21 U.S.C. § 841, et seq. criminal drug prosecution under the superseding indictment and parallel administrative punitive civil forfeitures under 19 U.S.C. § 1609 and 21 U.S.C. § 881 against evidence seized from Mr. Plunk's person and/or his home.

The government's theory for detention and indictment was that ownership of the property targeted for forfeiture was proof of guilt. Some of the property seized was specified as incriminating and subject to forfeiture under the superseding indictment,[8] and related incriminating property was subject to the punitive administrative forfeiture proceedings. Based upon the government's theory in the detention hearings and indictment, it was clear, given the state of the law, namely, that Simmons "use immunity" did not preserve Fifth Amendment privileges for statements made at administrative forfeiture proceedings, Mr. Plunk and his counsel could not jeopardize his criminal defense by filing formal administrative claims of ownership to contest forfeiture. A classic

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[8]Count 2 of superseding indictment at ¶ 10, Sec. B(1) and Count I ¶ 10, Sec. C. (App. 74, 78.)

"Hobson's choice" was presented.[9] (App. 47-53.)

Gerald Frank Plunk was subject to four prior judgments, punishments, and jeopardy events; four separate punitive seizures and 19 U.S.C. § 1609(b) forfeitures,[10] i.e. Final Adjudication(s) of Ownership/Declaration(s) of Forfeiture/Judgment(s) of Forfeiture and Punishment based on offenses in the initial and superseding indictments.[11]

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[9]Admitting, via formal verified administrative forfeiture claims signed by Mr. Plunk, ownership of the guns, gold, watch or cash would provide a major linchpin in the Government's case, to wit, tying Mr. Plunk to the co-conspirators and home, guns and cash seized therein, including cash distinctively vacuum-sealed to link Mr. Plunk to related vacuum-sealing machines and drug prosecutions in New York and Los Angeles, as specifically alleged in the indictment at Count 2, ¶B.1 and Count 1, ¶C.10. (App. 74, 78.) As established by sworn affidavits of Mr. Plunk and his counsel, Mr. Weidner, and the lower court's specific findings, due to this "Hobson's choice" and existing case law, formal administrative ownership claims were not filed. (App. 47-53.) Both of these affidavits preceded the ground-breaking (and as discussed infra at 26, ill-advised) new rule in Cretacci that Simmons "use immunity" now applies to admissions and/or claims of ownership of incriminating property in administrative forfeiture matters by approximately nine months. The forced decision to forego contesting forfeiture was approximately fifteen months before Cretacci. Quite simply, Mr. Plunk's forced forbearance not to contest the forfeitures merely reflected the advice any competent defense counsel was constrained to give based upon the state of the law, which any prudent defendant was required to follow; forego incriminating administrative claims or forfeiture defenses as to incriminating property to preserve Fifth Amendment privileges given parallel punitive forfeiture proceedings and criminal prosecution. The government took tactical advantage of these Fifth Amendment concerns by obtaining final 19 U.S.C. § 1609(b) judgments of forfeiture adjudicating Mr. Plunk as owner to punish him.

[10]Significantly, 19 U.S.C. § 1609(b) provides: a declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States." (Emphasis added.)

[11]The seizures and punitive forfeitures of Mr. Plunk's property were:

1. A Rolex wristwatch valued at $1,500 seized from his wrist by a DEA agent at arrest, under 21 U.S.C. § 881(a)(6) (Notice of

These punitive forfeitures and punishments were forfeiture of a watch seized from his wrist by the DEA at his arrest, and money, guns and gold seized from his home under a search warrant based on offenses in the indictments.[12]

Given the government's conscious tactical decision, solely within the power of the government, to force a "fight on two fronts," i.e. punitive administrative civil forfeiture and criminal forfeiture and indictment, defendant and counsel were powerless to make any strategic jeopardy decisions; neither voluntarily "abandoned" his property or "waived" or "forfeited" his double jeopardy protection.

C. Magistrate Roberts' Recommendation.

Magistrate Roberts issued the search warrant and presided at the detention hearings. He specifically found the property was Mr. Plunk's, he had been punished, and there was no "abandonment," "waiver," or "forfeiture" of double jeopardy protection due to the Hobson's choice:

> The Government cannot seriously argue that the administrative forfeitures in this case do not refer to

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Seizure no. 152090, 4-18-94) Final Judgment of Forfeiture under 19 U.S.C. § 1609(b) of 6-3-94, adjudicating Mr. Plunk as the owner. Judge Sedwick found said seizure, forfeiture and punishment based on the Alaska I conspiracy. (App. 13.)

2. Seizures at Mr. Plunk's residence on 3-24-94 of: (a) Assorted firearms valued at $4,040 (Notice of Seizure No. 152183, April 25, 1994), Final Judgment of Forfeiture under 19 U.S.C. § 1609(b), 6/10/94, adjudicating Mr. Plunk as owner; (b) Currency of $9,660 (Notice of Seizure No. 152199, May 9, 1994) Final Judgment of Forfeiture under 19 U.S.C. § 1609(b), 6/24/94, adjudicating Mr. Plunk as owner; and (c) Three bags of placer gold valued at $967.89 (Notice of Seizure No. 152824, May 9, 1994), Final Judgment of Forfeiture under 19 U.S.C. § 1609(b), 8/19/94 adjudicating Mr. Plunk as owner. (App. 54-69.)

[12]Both judges examined the factual basis for seizures and forfeitures incident to the search and arrest warrants and so found. (App. 11-13, 15, 22.)

property associated with the criminal defendant. The search warrants authorized searches of Plunk's property; the seizure notices reference Plunk, and the underlying investigation; and the indictment ties the property to Plunk. The record shows that Plunk was arrested for conduct giving rise to the administrative seizures and forfeitures as well as the indictment. The government's evidence at the bail hearing linked some of the personal property forfeited to Plunk. The government wants the court to find that Plunk has not been "punished" through civil forfeitures because he was not a party to those proceedings. At the same time, the government would deny him standing to assert a claim unless he waived his Fifth Amendment rights to assert standing. The government cannot have it both ways.

Plunk relies on the government's use of seized evidence at the bail hearing to illustrate that some of the property referenced in the administrative forfeiture actions is the same property and relates to the same offenses for which he is being prosecuted. At the bail hearing the government argued that Plunk was using the firearms and money to facilitate the underlying conspiracy to traffic in controlled substances. Plunk refers to the bail hearing to show the interplay of his right against self-incrimination in the civil forfeiture proceedings and in the criminal prosecution.

Recommendation Regarding Motion to Dismiss on Grounds of Double Jeopardy of Magistrate John D. Roberts, November 4, 1994, at pp. 8-9 (emphasis added). (App. 22.)

D. Judge Sedwick's Order.

Based on these recommendations, and independent de novo review of the bases for the seizures and forfeitures, Judge Sedwick agreed with Magistrate Roberts' assessment of the Hobson's choice and that there was no abandonment of the property or waiver or forfeiture of Fifth Amendment double jeopardy protection, found the forfeited property was

Mr. Plunk's, that it was adjudicated as his under 19 U.S.C. § 1609(b), and Mr. Plunk was thus previously punished:

> The declarations of forfeiture all identify Plunk as the property's owner at the time of seizure.[3]
>
> * * *
>
> DISCUSSION
>
> The magistrate judge recommended that Plunk's double jeopardy motion be granted at docket 208. *Based upon this court's de novo review, with the exception of the implied finding of fact and related conclusion of law that the administrative forfeitures are based upon all the same offenses as those with which Plunk is charged in the superseding indictment, the findings and conclusions made by the magistrate judge are correct and are adopted.* The implied factual finding and related conclusion that the administrative forfeitures are based upon the same offenses requires discussion.
>
> * * *
>
> This court finds that the crimes the Government had reason to believe Plunk had committed at the time of the seizures and upon which the administrative forfeitures proceeded were that Plunk possessed cocaine with intent to distribute it in Alaska, that Plunk possessed cocaine with intent to distribute it somewhere outside Alaska, and that Plunk was a member of the Alaska I, Alaska II and Lower 48 conspiracies. When this finding is coupled with the other findings and conclusions reached by the magistrate judge and adopted by this court, it follows that counts 1, 9, 10, 11 and 12 must be dismissed, because Plunk cannot be put in jeopardy on charges for which he has already been punished.

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[3] Plunk did not contest the forfeitures. His briefing indicates that the decision not to file a claim to the property was made in order to preserve his Fifth Amendment right not to testify.

Order From Chambers of the Honorable John W. Sedwick, November 17, 1994, at pp. 4, 7, 12 (italics added, underline emphasis in original). (App. 7, 9, 13.)

These findings were supported by affidavits of Mr. Plunk and counsel, and are not clearly erroneous.[13]

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13 6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold an guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

Affidavit of Gerald Frank Plunk of November 2, 1994 at 2, United States v. Plunk, Case No. A94-0036 CR (JWS) (emphasis added). (App. 48.)

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food sealing" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112) and further based upon my understanding that the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding

E. The Erroneous Ninth Circuit Opinion.

The Ninth Circuit's Plunk opinion ignored these specific factual findings by Magistrate Roberts and Judge Sedwick.

The opinion conflicts with $405,089.23 and Ursery, and raises constitutional questions of exceptional importance under the Fifth Amendment double jeopardy, self-incrimination, and due process clauses.

Relying on United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), reh'g en banc denied Nov. 15, 1995, the opinion overlooks and misconstrues material points of fact and law:[14]

1. Declaring Mr. Plunk "abandoned" property and did not suffer "punishment" under the double jeopardy clause (Plunk, slip op. at 1, citing Cretacci, 62 F.3d at 310);

2. Holding that because Mr. Plunk did not file a formal claim to the seized and forfeited property "he was not punished when it was forfeited" and because he "was not a

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> of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

Affidavit of Phillip Paul Weidner, 11-2-94, pp. 2-3, United States v. Plunk, Case No. A94-0036 CR (JWS) (emphasis added). (App. 52-53.)

[14]As noted, counsel is informed Mr. Cretacci's counsel will soon file a timely Petition for Writ of Certiorari. In light of certiorari in $404,089.23 and Ursery, this Court should grant same in conjunction with the instant Petition and the pending Petition for Writ of Certiorari in United States v. Baird, 63 F.3d 1213 (3d Cir.), Petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995), and consolidate oral argument.

party to the prior administrative forfeiture, he was not in jeopardy;" id. at 2;

3. Holding "a defendant's claim of ownership of property that was subject to forfeiture may not be used [to prove the defendant's guilt]" (Id. at 3) thereby extending Simmons "use immunity" protection to administrative forfeiture claims and proceedings in contradiction to Ninth Circuit authority of Baker v. United States, 722 F.2d 517 (9th Cir. 1983), and United States v. $15,500 U.S. Currency, 558 F.2d 1359 (9th Cir. 1977) (said cases indicating an incriminating administrative claim of ownership is not protected by the Fifth Amendment privilege against self-incrimination, and, by inference, not protected by Simmons);

4. Improperly misconstruing the 19 U.S.C. § 1609(b) forfeitures, which were Final Administrative Adjudications of Ownership, Declarations of Forfeiture, and Judgments of Forfeiture and Punishment, and holding that they did not constitute a "judicial adjudication of ownership" but were merely "computer generated" and meaningless, notwithstanding that the Declarations of Forfeiture state "Owner: Plunk, Gerald F," and that the statute provides that said declarations have "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States;" and

5. Erroneously applying, retroactively to Mr. Plunk, the two new Cretacci rules of Simmons "limited use immunity" and that administrative claims must be made to preserve double jeopardy protection, contrary to United States v. Givens, 767 F.2d 574 (9th Cir. 1984) cert. denied, 474 U.S. 953 (1985) (new decisions mandating defendant to speak to preserve a claim cannot be applied retroactively if silence adduced by reliance on prior circuit law), without permitting Mr. Plunk to brief and argue retroactivity or Simmons.

VIII. REASONS FOR GRANTING CERTIORARI.

A. Given The Grant Of Certiorari By This Court In $405,089.23 And Ursery, The Court Should Grant Certiorari In Plunk, Baird And Cretacci.

The well-reasoned decisions in $405,089.23 and Ursery

establish the government cannot, in violation of Halper, Kurth Ranch and Austin, gain tactical advantage and "force a fight on two fronts" by first taking a citizen's property via punitive forfeiture and then subsequently criminally prosecute for the same offense, or criminally prosecute for an offense and subsequently, in a separate proceeding, seek punitive forfeiture based on same. These decisions are based upon the foundation of the Fifth Amendment prohibition against double jeopardy and successive prosecutions and trace their origins to Greek and Roman law. See $405,089.23, 33 F.3d 1210 at 1215. It is crucial to grant certiorari in the instant matter, Baird, and Cretacci, to avoid preserving a "loophole" for the government to continue such a practice in the future without such double jeopardy protection or consequence. The Cretacci and Plunk panels denied double jeopardy protection under the transparent subterfuge that there had been voluntary "abandonment" of the property in the administrative proceedings, notwithstanding the fact that based upon then-existing case law, as discussed more fully herein, the "limited use immunity" in Simmons afforded to statements made to obtain standing in Fourth Amendment suppression motions did not protect a property owner claiming incriminating property in an administrative forfeiture proceeding. Not only is such an extension of Simmons use immunity ill-advised in terms of policy considerations for the courts, as discussed infra at 26, but it is far from clear that such Simmons "limited use immunity" will in fact be afforded in the future to defendants in circuits other than the Ninth Circuit since Cretacci was the first case to so rule, and the other circuits have not yet adopted such an ill-advised and unprecedented doctrine. The government can continue to gain tactical advantage by instituting punitive forfeitures as to potentially incriminating property, secure in the knowledge any competent defense counsel would be committing malpractice to advise a target defendant to do other than to forego making administrative forfeiture claims, and that any defendant must follow said advice. The government can then claim "abandonment," and the underlying holding of $405,089.23 and Ursery and, more critically, the underlying principles and policies of the double jeopardy clause, will be emasculated.

B. Use Of The Legal Fiction Of "Abandonment" Of Property To Avoid The Double Jeopardy Bar Violates Basic Constitutional Doctrines; Manufacturing The Concept Of Abandonment Violates Fundamental Fairness And Due Process Of Law.

Neither Mr. Plunk nor counsel voluntarily abandoned his property or waived or forfeited double jeopardy rights and had no choice under existing law but to forego a claim; the Plunk panel cannot disturb the lower court's specific factual findings on these issues, nor may the new law announced in Cretacci be applied retroactively to defeat the truth. The legal fiction of abandonment violates fundamental fairness and due process.

The Ninth Circuit's holding that failure to file a claim and cost bond constitutes abandonment of seized property is disingenuous, erroneous, and ignores the "Hobson's choice" presented by then-existing case law and the government's tactical decision, solely within its power to make, to expose Mr. Plunk to parallel jeopardy proceedings and force him and counsel, in violation of the ancient underpinnings of the double jeopardy clause to "fight on two fronts," i.e. to contest a punitive administrative civil forfeiture and defend against a criminal forfeiture and criminal indictment.

1. Factually and Legally, There was no Abandonment of Property or Waiver or Forfeiture of Double Jeopardy.

Forced relinquishment or forbearance of a claim is not abandonment. One must also distinguish relinquishing expectations of privacy and abandoning ownership.

> Fourth Amendment Constitutional law notions of abandonment do not apply. Abandonment in the strict property right sense is to be distinguished from abandonment in search and seizure cases where the issue is merely whether the individual has relinquished his interest in property so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search. [citations.] 'Mr. Justice Frankfurter in *Jones v. United States*, 362 U.S. 257,

80 S. Ct.. 725, 4 L.Ed.2d 697 (1960), admonishes that it is unnecessary and ill-advised to import into the law of constitutional search and seizure the subtle distinctions of private property law.' Katsaris v. United States, 684 F.2d 758, 761 (11th Cir. 1982) (citations omitted, emphasis added).

Here there was no voluntary intent to abandon. Abandonment, as applied to property law, requires:

> [A] positive intent to part with ownership. It is essential that the owner act without coercion or pressure. The doctrine of abandonment has no application unless there is a total desertion by the owner without being pressed by any necessity, duty, or utility to himself, but simply because he no longer desires to possess the thing and willingly abandons it to whoever wishes to possess it. Id. at 762 [citations omitted, emphasis added].

In Katsaris, the IRS tried to claim funds to which the defendant disclaimed ownership. The Eleventh Circuit determined Mr. Katsaris did not abandon money. His sole purpose in disclaiming the funds was to separate himself from incriminating evidence in a criminal prosecution, which does not meet the test the abandonment be voluntary, "without coercion or pressure, or without the owner being pressed by any necessity or utility to himself." Id. at 762.

The Ninth Circuit's concept of abandonment in search and seizure cases merely addresses Fourth Amendment privacy rights as to relinquishment of property prior to seizure by the Government. United States v. Huffhines, 967 F.2d 314, 318 (9th Cir. 1992), United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir. 1986). Even in the Fourth Amendment context, the abandonment of property must be "voluntary." Huffhines, 967 F.2d at 318; United States v. Kendall, 655 F.2d 199, 200 (9th Cir. 1981); United States v. Berd, 634 F.2d 979, 987 (5th Cir. 1981). Whether or not property has been abandoned turns on intent. "[T]he inquiry should focus on, whether, through words, acts or other objective

indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure." Nordling, 804 F.2d at 1469. See also United States v. Hernandez, 7 F.3d 944, 947 (10th Cir. 1993). Abandonment has been demonstrated when a suspect leaves his property unattended in a public place or denies ownership. United States v. Most, 876 F.2d 191, 198 (D.C. Cir. 1989). In United States v. Brady, 842 F.2d 1313, 1316 (D.C. Cir. 1988), the court held that a "spontaneous denial of ownership, unaffected by police provocation, demonstrates sufficient intent of disassociation to prove abandonment." However, "[t]he law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment." United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989).

The use of the subterfuge of "abandonment" when in truth and reality there was no such voluntary option given or choice made is to use the exact sort of legal fiction condemned in $405,089.23 ("We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.'" $405,089.23, 33 F.3d at 1217.

It may be that via his forced failure to file a claim and cost bond, Cretacci waived his Fifth Amendment due process rights to contest the forfeiture, but it does not follow that by his yielding to the "Hobson's choice" and not filing any such incriminating claim Mr. Plunk also gave up his double jeopardy rights to protection against multiple punishment for the same offense in subsequent prosecutions.[15]

Mr. Plunk and counsel did not "abandon" the property; they merely did not contest the forfeitures since they could not do so in light of valid Fifth Amendment concerns based on then-existing case law. The forfeiture was nonetheless of

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[15] I.e., one must likewise distinguish seizure of abandoned property which does not implicate a former possessor's privacy rights and uncontested forfeiture of property which does not violate due process property rights. The latter still is a taking that constitutes punishment.

property that Mr. Plunk had not voluntarily relinquished, and thus he suffered punishment.

In Huffhines, the Court held that a defendant denying ownership or knowledge of a car linked to keys found on his person meant that the defendant could not challenge the search in light of such disavowing of any connection to the car. 967 F.2d 318. In Nordling, a similar result was reached where the defendant denied ownership of luggage and there was a physical relinquishment of same, which the Court held was inconsistent with the continuing expectation of privacy. Significantly, the property in both instances had been abandoned before the government began its searches and seizures. In Mr. Plunk's case, the government forcibly seized the property and began forfeiture before any alleged "abandonment." By presenting Mr. Plunk and counsel with the "Hobson's choice," the government was able to orchestrate action which it now claims is abandonment, i.e. precluding the filing of a mandatory but incriminating claim of ownership to preclude administrative forfeiture. In both Huffhines and Nordling an affirmative act was required to show abandonment. Mr. Plunk and counsel were precluded from taking any action in an administrative claim as to property that was forcibly seized and taken from Mr. Plunk and by no stretch of the imagination, voluntarily abandoned.

As Magistrate Wayne Brazil's courageous analysis of the Hobson's choice issue in his report and recommendation in United States v. Ailemen, 1995 WL 442603 (N.D.Cal. 1995),[16] states:

> First, it is not at all clear that Pius Ailemen's decision not to contest the civil forfeiture was in any meaningful sense "voluntary." He has advised the court, through counsel, that even though the property

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[16]This unpublished Report and Recommendation is referred to by the Dissent in the Order Denying Rehearing in United States v. $405,089.23 in U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), amended on denial of reh'g, 56 F.3d 41 (9th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996). Ten copies of Ailemen are included herewith.

in question was his, and even though he would challenge the assertion that it "was used or acquired as a result of a **drug-related offense**," he decided not to file a claim and contest the forfeiture in order to preserve his Fifth Amendment right not to incriminate himself. In other words, he felt constrained to choose between his right to claim his property and his right not to incriminate himself. A decision made under such restraint is not fairly considered "voluntary." *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (9173); and *Garrity v. State of New Jersey*, 385 U.S. 493 (1967).

* * *

[I]t is a complete figment of jurisprudential imagination to suggest that Pius Ailemen "voluntarily" decided not to contest the forfeitures in issue here. He was effectively coerced into that decision--so it would be quite unfair to visit upon him the loss of his Double Jeopardy rights as a consequence of that decision. Id. at pp. 28-29, 39 (emphasis added).

The Cretacci panel's manufacture of "abandonment" via forced forbearance of a claim of ownership improperly blends the portion of 19 U.S.C. § 1609(a) addressing adjudication, i.e. a property not claimed is to be deemed "forfeited," with the manner of disposition, i.e. it may be sold "in the same manner as merchandise abandoned in the United States." Significantly, nowhere in the statutory scheme is there any provision the property is to be deemed "abandoned."

C. It Is Fundamentally Unfair And A Violation Of The Due Process, Self-Incrimination And Double Jeopardy Clauses Of The Fifth Amendment To Disingenuously Claim Mr. Plunk And His Counsel Were Not Forced To Forego A Claim Or Defense In The Punitive Administrative Forfeiture Proceedings; Then-Existing Case Law Held Such A Claim Or Defense Would Have Been Available To The Government To Incriminate Mr. Plunk In The Parallel Criminal Matter.

At the time Mr. Plunk, Mr. Cretacci and their counsel

were forced to forego administrative claims: (1) under uniform pre-existing case law of the Ninth Circuit and other circuits, there was no procedural or substantive way to assert the Fifth Amendment at the administrative claim level except by remaining silent and not filing a claim of admission or ownership; (2) by statute, regulation and case law an unprotected, non-privileged, mandatory and incriminating personal claim and admission of ownership of incriminating property was required to defeat summary administrative adjudication of forfeiture; and (3) doing so would clearly have been fatal to Mr. Plunk's defense given the incriminating nature of the property at issue.[17]

Thus, Cretacci's holding that, "an owner who receives notice of the intended forfeiture and fails to claim an ownership interest in the property has effectively abandoned it," has no statutory basis or foundation in prior case law.

Mr. Plunk and counsel cannot be retroactively held chargeable with knowledge of Cretacci's new extension of the Simmons "use immunity" doctrine to administrative forfeiture claims. As Cretacci, Simmons, and other Supreme Court authority hold, a defendant cannot be forced to "waive" one constitutional right (Fifth Amendment self-incrimination) to

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[17]See United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983). The court held the owner was required to "choose between preserving his privilege against self incrimination and losing the civil suit." (Emphasis added.) United States v. Kordel, 397 U.S. 1 (1970), held an attempt to retroactively claim the Fifth Amendment was not allowed as to prior admissions. Mr. Plunk and counsel avoided this fatal result, foregoing formal administrative claims and admissions, preserving the Fifth Amendment privilege, and suffering punitive forfeitures. United States v. Premises Located at Route 13, 946 F.2d 749 (11th Cir. 1991), acknowledged "the Fifth Amendment is violated when a person, who is a defendant in both a civil and a criminal case, is forced to choose between waiving his privilege against self-incrimination or losing the civil case on summary judgment." 946 F.2d at 756, citing Pervis v. State Farm Fire & Casualty Co., 901 F.2d 944, 946-47 (11th Cir.), cert. denied, 498 U.S. 899 (1990). See also United States v. U.S. Currency, 626 F.2d 11 (6th Cir.), cert. denied, 449 U.S. 993 (1980).

protect another (standing to assert Fourth Amendment rights). To hold Mr. Plunk "abandoned" or "forfeited" double jeopardy protection is contrary to precedent stating one need not assert a double jeopardy right at an initial prosecution and punishment to enjoy double jeopardy protection from subsequent attempts at prosecution. The required analysis is one of "waiver" as opposed to "forfeiture." There was clearly no knowing waiver since there was no notice to Mr. Plunk or counsel of the jeopardy consequences of foregoing an administrative claim to preserve his Fifth Amendment rights based on existing case law and there was no procedural safeguards to ensure a knowing waiver or "forfeiture" of such double jeopardy protection. See United States v. Broce, 488 U.S. 563 (1989), and United States v. Olano, 113 S. Ct. 1770, 1777 (1993) (establishing procedural safeguards for waiver and disavowing forfeiture analysis for double jeopardy in the absence of a guilty plea in the second prosecution). See also 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 9.03 at 9-43 (1995); Mennonite Board of Missions v. Adams, 462 U.S. 791, 795, 799-800 (1983), and Mullane v. Central Hanover Bank & Trust Co., 337 U.S. 306 (1950) (necessity of notice and voluntary, informed waiver of basic rights).[18]

1. The Legal Doctrines of "Abandonment," Implied Waiver and Simmons "Limited Use Immunity" in Cretacci Cannot be Applied Retroactively to Prejudice Mr. Plunk, who Relied on the Advice of Counsel Mandated by Existing Case Law.

The Plunk panel relied on the new rule of "limited use immunity" enunciated in Cretacci at 62 F.3d 311:

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[18]For additional authority that waiver of basic constitutional rights must be knowing and voluntary with clear notice of the consequences, that waiver may not be assumed from a silent record, and that the burden of proof of waiver is on the prosecution, see Taylor v. Whitley, 933 F.2d 325, 330 (5th Cir. 1991), cert. denied, 503 U.S. 988 (1992); Barker v. Wingo, 407 U.S. 514, 519 (1972); Miranda v. Arizona, 384 U.S. 436, 444 (1966); and Carnley v. Cochran, 369 U.S. 506, 516 (1962).

> In Cretacci, we rejected the "argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy." [Cretacci at 311.] The court pointed out that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt." Id. Similarly, "a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." Id. Plunk Memorandum at 3. (App. 2-3.)

The Cretacci reference to "pre-trial suppression hearing" is to Simmons. Prior to Simmons, whether claims of ownership to establish standing in pre-trial suppression testimony could be used at trial was an unsettled question of law, with most courts ruling against defendants. Simmons announced its new rule for the stated purpose of relieving defendants of the "Hobson's choice" which the Court found "intolerable." Simmons, 390 U.S. at 394. However, pre-Cretacci, no court had ruled such Simmons "use immunity" extended to incriminating administrative forfeiture claims of ownership. In fact, many courts have noted the expansion of said rule to other forums than constitutional suppression hearings requires a specific new rule of law. See Seattle Times Co. v. United States Dist. Ct. for the Western Dist. of Washington, 845 F.2d 1513, 1519 (9th Cir. 1988) (Reinhardt, J. concurring). In criminal prosecutions following civil forfeitures, although defendants were absolutely required to enter civil claims to contest forfeiture, and the Fifth Amendment could not be pled at the administrative level,[19] numerous commentators[20] and courts,

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[19]Attempting to assert the Fifth Amendment at the administrative level in the absence of a fatal and/or unprotected admission and claim of ownership to incriminating property, signed personally by the owner/defendant, would not have stayed or defeated summary adjudication and forfeiture under 19 U.S.C. § 1609(b). Baker v. United States, 722 F.2d 517 (9th Cir. 1983), United States v. $15,500 U.S. Currency, 558 F.2d 1359 (1977). Based on pre-Cretacci law, such fatal admissions and

including the Ninth Circuit, held incriminating statements made during such civil forfeiture proceedings were admissible in the subsequent criminal prosecutions.[21]

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claims of ownership would have been used in the parallel criminal proceedings to devastate Mr. Plunk's defense, as ownership of the property was alleged to have significant evidentiary value as proof of guilt and the linchpin in the Government's case. The Government admitted this, acknowledging under Ninth Circuit law to avoid forfeiture:

> [A] claimant to seized property [must file a] detailed claim...[which] cannot be avoided by reliance on the Fifth Amendment privilege against self-incrimination. [Citing Baker at 722 F.2d 518, $15,500.00 at 558 F.2d 1359, 1360, and Mercado v. United States Customs Service, 873 F.2d 641, 644 (2d Cir. 1989).] (Emphasis added.)

Reply Brief for United States in No. 94-30421/Answering Brief for United States in No. 93-34022 at 3-4.

The importance of Baker and $15,500 cannot be underestimated. Indeed, the Drug Enforcement Administration's "Notice(s) of Seizure" sent to Mr. Plunk contained the following warning:

> "**Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977)."

[20] See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶10.03, 10-39 to 10-41 (1995).

[21] In United States v. Flores, 679 F.2d 173 (9th Cir. 1982), cert. denied, 459 U.S. 1148 (1983), although the "Hobson's choice" was recognized, an administrative claim letter sent as a requirement to initiate a formal civil complaint to protect Fourth Amendment rights was not constitutionally protected.

> Flores argues that *Simmons* should be extended to prevent the admission at his criminal trial of the statements he made in a formal effort to recover damages for an alleged violation of his Fourth Amendment rights. We understand, but reject the argument. Flores, 679 F.2d at 177 (emphasis added).

Similarly, in United States v. Clawson, 831 F.2d 909 (9th Cir. 1987), cert. denied, 488 U.S. 923 (1988), an affidavit of ownership of a pistol in support of a state court civil motion for return of seized items was held admissible in federal prosecution for felon in possession notwithstanding Simmons. See also United States v. U.S. Currency, 626 F.2d 11 (6th

It is clear the government had been and was exploiting this "Hobson's choice" presented by Baker and $15,500 as a strategic ploy and should now face the jeopardy consequences. Discussing the advantages of civil forfeiture over criminal forfeitures, the U.S. Department of Justice encouraged broader and more aggressive use of the civil forfeiture statutes not only because of their advantage with respect to the standard and burden of proof, but also because:

> The claimant may be deposed and disclosure of his records compelled...And, while the Fifth Amendment may still be asserted, a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual

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Cir. 1980), cert. denied, 449 U.S. 993 (1980); and Note, "Constitutional Rights in Civil Forfeiture Actions," 88 Colum. L. Rev. 390 (1988) (based on existing law, the issue was open in federal court).

> [B]y alleging an interest in the property, a claimant may also provide information that can be used against him by the state in a later criminal trial. A claimant may preserve his Fifth Amendment right only by not coming forward and alleging an interest in the property, resulting in the automatic forfeiture of the property. Such a result is virtually identical to the outcome that the Supreme Court found unconstitutional in the *Garrity-Lefkowitz* line of cases. Id. at 396-97 (emphasis added).

See also United States v. Salvucci, 448 U.S. 83, 96 (1980) (Simmons "use immunity" rule does not afford "complete protection against the 'self-incrimination dilemma,'" given the availability of use for impeachment purposes), quoting Brown v. United States, 411 U.S. 223 (1973). United States v. Hitchcock, 992 F.2d 236 (9th Cir. 1993) (uncertainty as to "use immunity" for applications for court-appointed counsel). United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992) (necessity of stays at United States District Court civil forfeiture level as opposed to administrative forfeiture wherein no such procedure existed); Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979); Wohlstrom v. Buchanan, 884 P.2d 687 (Ariz. 1994); Resek v. State, 706 P.2d 288 (Alaska 1985).

> determination, while answering questions may have incriminating consequences in the criminal proceedings.
>
> * * *
>
> For these reasons, the civil claimant is in a very difficult position relative to his posture in a criminal trial. ...This means that, even when tracing obstacles exist, forfeiture proceedings should be considered since the government may never be put to its proof.

U.S. Department of Justice, Asset Forfeiture training manual No. 1, November 1988, Addendum Added January 1992, "The Advantages of Civil Forfeiture," at 2 (emphasis added).

The Cretacci holding, "for the same reasons stated in Simmons, a defendant's claim of ownership at a forfeiture proceeding may not be used in a subsequent criminal proceeding," is incorrect in assuming such "use immunity" as to admissions in suppression proceedings or administrative claims existed prior to controlling judicial precedent establishing same. The Simmons Court specifically established new law for Fourth Amendment admissions. It did not reach its conclusions based upon existing law. By extending Simmons to admissions made in prior civil forfeiture proceedings, the Cretacci court has established a new rule of law despite the lack of controlling precedent.

Since Cretacci has announced a new rule of law for the Ninth Circuit, and because Mr. Plunk and his counsel relied to their detriment on existing case law and were confronted with the resulting "Hobson's choice" due to the government's strategic ploy, which precluded them from filing statements of ownership in the forfeiture proceedings, this new rule cannot be applied retroactively to Mr. Plunk to his detriment.

2. Supreme Court And Ninth Circuit Authority Establish New Decisions Mandating A Defendant To Speak To Preserve A Claim Cannot Be Applied Retroactively If The Defendant's Prior Silence Was Induced By Reliance On Prior Circuit Law.

In Luce v. United States, 469 U.S. 38 (1984), the Court held a defendant must testify to enjoy appellate review of denial of his motion to prevent impeachment with a prior conviction. However, in United States v. Givens, 767 F.2d 574 (9th Cir. 1984), cert. denied, 474 U.S. 953 (1985), the Ninth Circuit held it would be unfair to apply a new rule to a defendant who relied on prior law in choosing to remain silent but seeking to preserve his appeal rights. Id. at 578-79.

> In the instant case, Luce establishes a new principle of law which would, if applied retroactively, wreak a substantial inequity by precluding Givens from challenging the admissibility of proof of his prior convictions. Although application of the Luce principle to the present case arguably would further the purpose of the rule ... the first and third factors [Hardy factors[22]] militate so strongly against

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[22] Allen v. Hardy, 478 U.S. 255, 258 (1986). Traditional factors for whether new constitutional rules apply retroactively are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. at 478 U.S. 258 (citation omitted). Accord United States v. Kane, 876 F.2d 734 (9th Cir.), cert. denied, 493 U.S. 861 (1989); Barina v. Gulf Trading and Transp. Co., 726 F.2d 560, 563 (9th Cir. 1984). If the new doctrine advances determination of guilt or innocence, retroactivity is favored; if it merely deals with procedural due process, retroactivity is not afforded. Allen v. Bunnell, 891 F.2d 736, 738 (9th Cir. 1989). As demonstrated by the affidavits and findings of fact, there was reliance on pre-Cretacci standards in this case. The new Cretacci rule extending Simmons "use immunity" does not impact guilt or innocence. It must be applied prospectively and not retroactively. See, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966); Miranda v. Arizona, 384 U.S. 436 (1966); Tehan v. United States, 382 U.S. 406 (1966); Linkletter v.

retroactive application that they outweigh the second factor. Givens, 767 F.2d at 578.

The Givens logic applies here. The previous rule was an administrative claim of ownership of incriminating property in a forfeiture action was admissible in a criminal case. The new Cretacci rule grants such protection but requires an administrative claim to preserve double jeopardy rights. Because Mr. Plunk's, and Mr. Plunk's counsel's silence, i.e. their decision not to file a claim, was based on and mandated by reliance on this prior law, Cretacci's new rule requiring them to affirmatively "speak," i.e. to file such a claim, cannot be applied retroactively. It is a fundamental legal premise that reliance on prior law by a defendant or counsel should not be punished. "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Landgraf v. USI Film Products, 114 S. Ct. 1483 (1994) (1991 Civil Rights Act amendments not retroactive).

An axiom of constitutional law is waiver of constitutional rights must be knowing, intelligent and voluntary. Johnson v. Zerbst, 304 U.S. 458 (1938). Given the law existing when Mr. Plunk and counsel were forced to not claim his seized property, it is unjust and disingenuous to say such decision was a knowing, intelligent and voluntary "abandonment" of property or "waiver" of protection against subsequent punishment. The concept of "abandonment" or "waiver" or "forfeiture" have essential elements of knowledge, notice, and voluntariness absent herein given the Hobson's choice presented based on then-existing case law.

Walker, 381 U.S. 618, 639 (1965); Griffin v. California, 380 U.S. 609 (1965) (not retroactive); Escobedo v. Illinois, 378 U.S. 478 (1964) (not retroactive); Mapp v. Ohio, 367 U.S. 643 (1961) (not retroactive); Bunnell, 891 F.2d at 738 (not retroactive).

D. The Cretacci And Plunk Holdings Extending Simmons "Limited Use Immunity" To Administrative Forfeitures And Requiring A Contested Administrative Forfeiture To Preserve Double Jeopardy Rights Is Ill-Advised From A Public Policy Perspective.

The zeal of the Cretacci and Plunk panels to extend, with no prior precedent, Simmons "use immunity" to administrative forfeitures to avoid double jeopardy implications of $405,089.23 and punish the defendants is ill-advised. In the transparent attempt to deny relief to Mr. Cretacci and Mr. Plunk, i.e. to avoid dismissal of criminal charges, the Cretacci and Plunk panels have opened the proverbial Pandora's box by affording litigants in administrative and civil forfeitures the opportunity to conduct far-ranging civil discovery procedures which enjoy Simmons "use immunity." Doing so will allow such target defendants to fully explore the government's case, and will emasculate the Jenks Act, but will nonetheless afford such litigants knowledge that the results may not be used against them, although they may certainly choose to use the fruits against the government in any subsequent criminal prosecutions. The result will in fact spawn a multitude of constitutionally protected civil forfeiture litigation, including depositions, interrogatories, etc., by defendants directed at discovery and crystallizing the government's case. This concern is undoubtedly part of Judge Kleinfeld's concurring opinion in Cretacci, wherein he indicates he would not reach the Simmons issue. Cretacci, 62 F.3d at 311 (Kleinfeld, J., concurring). Moreover, why should the court system be burdened with having to resolve a new flood of contested forfeiture actions? See, 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶12.10 at 12-141 n. 33.1 (1995) ("[A] rule which would require property owners to file a claim and go through the motions of contesting a civil forfeiture merely to preserve a double jeopardy issue has little to recommend it. Tens of thousands of uncontested forfeitures would soon find their way into court."). See also, United States v. Baird, 63 F.3d 1213 (3d Cir.), petition for cert. filed, 64 U.S.L.W. 3318 (U.S. Oct. 17, 1995). This Court should reject such extension of Simmons "limited use

immunity" or the requirement of a frivolous contest of a forfeiture as to which there may be no good faith defense merely to preserve a double jeopardy claim, as ill-advised. Even if the Court adheres to same, it cannot be applied retroactively. It is disingenuous to claim a defendant or defense counsel must have "clairvoyantly" predicted such a new rule. To simply recognize the truth, namely, that Mr. Plunk was punished, did suffer double jeopardy, and was prevented by a true "Hobson's choice" under existing law as to Simmons from filing administrative claims, will not affect many government prosecutions. Mr. Plunk and Mr. Cretacci are in a unique procedural posture, as opposed to other defendants who have not raised pre-trial double jeopardy issues concerning punitive and administrative forfeitures. The government can, in the future, avoid the double jeopardy problem simply by combining the forfeiture and criminal proceedings into one unitary proceeding, as suggested in $405.089.23. There is no need to drastically change existing law merely to compromise Mr. Plunk's and Mr. Cretacci's constitutional rights.

Accordingly, this Court should grant certiorari and rule there is no such Simmons "use immunity" in punitive forfeiture matters and/or that Mr. Plunk did not waive his double jeopardy rights by foregoing an administrative claim based on existing law, while preserving the holdings of $405.089.23 and Ursery that the government's decision to proceed by way of punitive civil forfeiture precludes later criminal prosecution for the same offense.

E. The Panel's Claim Mr. Plunk Was Not A Party To The Forfeitures, In Jeopardy, Or Punished And The Property Was Not Adjudicated As His Is Erroneous.

The Plunk Opinion at p. 3 makes the startling holding that although the 19 U.S.C. § 1609(b) Final Adjudications of Ownership/Declarations of Forfeitures/Judgments of Forfeiture and Punishment contain specific findings of Mr. Plunk as the owner of the property, they "do not rise to the level of a judicial adjudication of ownership" since they "contain computer-generated information." Such a self-

serving de minimus distinction is without merit. Is a Supreme Court or Ninth Circuit "computer or word-processor generated" opinion precedent, or does a "word-processor generated judgment" by a District Court have meaning? Most significantly, as pointed out in Mr. Plunk's briefing, between the date of the notices of seizures and the date of the actual adjudications of forfeiture, Mr. Plunk's name was actually inserted by DEA personnel, consciously and intentionally, as the owner, so as to constitute an adjudication to allow the Government and the DEA future significant tactical protection via res judicata and collateral estoppel to prevent Mr. Plunk from later claiming the property. Clearly, someone at the DEA's chief counsel's office entered the information of Mr. Plunk as the "owner" and an "inmate" in said adjudications. The focus on one being a "party" or being "placed in jeopardy" is simply misguided. The misapplication of the "attachment of jeopardy" phrase to a multiple or successive punishment challenge appears to stem from United States v. Torres, 28 F.3d 1463 (7th Cir. 1994), cert. denied, 115 S. Ct. 669 (1994). With specific findings by both Magistrate Roberts and Judge Sedwick the property was Mr. Plunk's, there is no issue of ownership. With no ownership issue, the real Torres issue is not "standing" or "abandonment" but whether double jeopardy "waiver" can be implied from coerced forbearance regarding contesting administrative forfeiture in the face of the "Hobson's choice." The Torres court held since Torres never made a claim "as a non-party, Torres was not at risk in the forfeiture proceeding" and "without risk of a determination of guilt jeopardy does not attach. ... You can't have double jeopardy without a former jeopardy." Id. at 1465, quoting Serfass v. United States, 420 U.S. 377, 391 (1975). This ignores the concept of jeopardy in a multiple punishment context is one of punishment, and the phrase "attachment of jeopardy" is significantly omitted from the Supreme Court cases that deal with the issues of multiple punishments. In a civil forfeiture proceeding, obviously there is no risk of adjudication of guilt or "incarceration" and thus no "formal" jeopardy. See Fain v. Duff, 488 F.2d 218, 225 (5th Cir. 1973), cert. denied, 421 U.S. 999 (1975). The "attachment of jeopardy" analysis overlooks that United States civil forfeiture statutes are

punishments, not prosecutions. Austin v. United States, 113 S. Ct. 2801 (1993), Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994). See also United States v. Chandler, 36 F.3d 358 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). The real issue is a "jeopardy event," i.e. risk of punishment.[23] Clearly, it was Mr. Plunk's property, as specified in the 19 U.S.C. § 1609(b) adjudications, and as specifically found by Magistrate Roberts and Judge Sedwick, he was at "risk of punishment" and was punished and thus was entitled to double jeopardy protection from multiple or successive punishment.

IX. SUMMARY AND CONCLUSION.

Factually and legally, as supported by affidavits of

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[23] United States v. Kemmish, 869 F. Supp. 803 (S.D. Cal. 1994), aff'd based upon Cretacci, 66 F.3d 336 (9th Cir. 1995), misread United States v. Scott, 437 U.S. 82 (1978), and United States v. Vaughan, 715 F.2d 1373 (9th Cir. 1983), concerning necessity of personal adjudication of guilt in administrative forfeitures. Scott held no final former jeopardy attached given a mid-trial mistrial/dismissal at defendant's request with no judgment of punishment. Vaughan held no jeopardy attached given a pre-trial dismissal with a plea bargain and no judgment of punishment. The former jeopardy event is a judgment of punishment and in either a civil or administrative forfeiture is final punitive judgment of forfeiture of property belonging to a culpable owner as recognized in Kurth Ranch, Austin, $405,089.23 and United States v. One 1978 Piper Cherokee Aircraft, 37 F.3d 489 (9th Cir. 1994). Serfass, like Scott and Vaughan, held no former jeopardy bar given pretrial dismissal with no judgment of punishment. The so-called "risk of a determination of guilt" language as to jeopardy from Serfass relied upon in Torres and the Government in this case refers to risk of adjudication and judgment of punishment. Unlike questions of ownership and who was punished presented in Torres at 28 F.3d 1465-66, here there were specific adjudication(s) of punishment naming Mr. Plunk the culpable owner in the final § 1609(b) judgment(s) at the Government's insistence, specifically adding said name after notices of seizure. (App. 54-69.) The lower court so found. (App. 7, 9, 11-13, 21-22, 25-27.) See also United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), cert. granted, 64 U.S.L.W. 3477, 3484 (U.S. Jan. 12, 1996) (jeopardy focus is on risk of judgment(s) of forfeiture—not guilt).

Mr. Plunk and counsel and specifically found by Magistrate Roberts and Judge Sedwick, neither Mr. Plunk nor his counsel abandoned his property or waived double jeopardy rights. It was Mr. Plunk's property that was forfeited. He was at risk of and suffered punishment, and is entitled to a dismissal of this action on double jeopardy grounds. The new and unprecedented ruling in Cretacci that Simmons "use immunity" applies to administrative claims so as to alleviate the "Hobson's choice" presented and that frivolous, bad faith administrative forfeiture defenses are necessary to preserve double jeopardy rights are ill-advised from a public policy perspective. Even if this Court now chooses to extend and adhere to same they cannot be applied retroactively to prejudice Mr. Plunk. The truth and reality is both Mr. Plunk and counsel had no choice, based upon existing case law, but to forego administrative claims to preserve Fifth Amendment privileges, given the incriminating nature of the property the subject of the punitive forfeitures. Since the 19 U.S.C. § 1609(b) adjudications specifically found the property was Mr. Plunk's and factually it was Mr. Plunk's, as established by the nature and location of the seizures, the government's allegations in the detention hearings and indictment, and the court's findings, it is clear he suffered punishment and, accordingly, prior jeopardy. As recognized in Ursery, the focus of a "jeopardy event" is not risk of adjudication of guilt but risk of adjudication of forfeiture or punishment. Having suffered said risk, and four of such punishments, Mr. Plunk is entitled to the protection of the double jeopardy clause against subsequent prosecution based upon the offenses which served as the basis for said forfeitures; this Court should grant certiorari and so rule.

Respectfully submitted this 1st day of February, 1996.

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(2)

Supreme Court, U.S.
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No. 95-1243

In the Supreme Court of the United States

OCTOBER TERM, 1995

GERALD FRANK PLUNK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's prosecution for ten drug trafficking offenses after the prior uncontested administrative forfeiture of property and cash seized from him.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the judgment is noted at 68 F.3d 482 (Table). The order of the district court granting in part and denying in part petitioner's motion to dismiss (Pet. App. 4-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1995. A petition for rehearing was denied on December 14, 1995. Pet. App. 29. The petition for a writ of certiorari was filed on February 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the District of Alaska returned a superseding indictment charging petitioner with two counts of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846; operating a continuing criminal enterprise, in violation of 21 U.S.C. 848; four counts of using a communications facility to facilitate a controlled substance offense, in violation of 21 U.S.C. 843; and three counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 6. Before trial, petitioner moved to dismiss the ten counts of the indictment against him on the ground that his trial on those counts would violate the Double Jeopardy Clause. The district court dismissed five of the counts against petitioner, but declined to dismiss the remaining five. *Id.* at 15.[1] The court of appeals affirmed the denial of petitioner's motion to dismiss five of the counts and reversed the district court's order to the extent that it granted petitioner's motion to dismiss the other five counts. *Id.* at 1-3.

1. On March 22, 1994, law enforcement officers applied for a warrant to search petitioner's home in Anchorage, Alaska. The affidavit in support of the application stated that between 1980 and 1990, petitioner had sold cocaine to Warren Jeff Funderburk; that in April 1993, petitioner had recruited Hal Booher to transport cocaine from Los Angeles and Houston to New Jersey; and that between August and December 1993, Booher, at petitioner's behest, had

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[1] The superseding indictment contained 12 counts. Pet. App. 6. Counts 7 and 8 alleged violations of 21 U.S.C. 843 by petitioner's co-defendant, and those counts are not at issue here.

transported seven or eight loads of cocaine weighing between 200 and 220 kilograms each. On the basis of that affidavit, a magistrate judge issued the warrant. Gov't C.A. Br. 3.

During the ensuing search of petitioner's home, government agents seized, among other items, $9,660 in cash, $967.89 worth of Placer gold, and assorted firearms worth approximately $4,040. On March 25, 1994, petitioner was arrested. At the time of his arrest, law enforcement agents seized a Rolex watch, valued at $1,500, from petitioner's wrist. Gov't C.A. Br. 3; see Pet. App. 6-7.

2. On March 24 and April 18, 1994, the Drug Enforcement Administration (DEA) issued notices of seizure for the firearms, currency, and Placer gold seized from petitioner's home, and for the Rolex watch seized from petitioner at the time of his arrest. Each notice stated that the property in question was subject to forfeiture because it "was used or acquired as a result of a drug related offense." Gov't C.A. Br. 4. Each notice also stated that a claimant "may petition the DEA for the return of the property or [the claimant's] interest in it * * * and /or * * * may contest the seizure and forfeiture of the property." *Ibid.* The notice explained the procedure for filing a claim or a petition for remission of the forfeiture and stated that a "claim of ownership" to the property must be filed within 20 days of first publication of the notice. *Id.* at 4-5. The notices were mailed to petitioner's home and to his place of detention. *Id.* at 5. As required by federal regulation, the DEA also published notification of the seizures and potential forfeiture of each item (as well as the procedure for

filing a claim) in *USA Today* on three successive Wednesdays. *Ibid.*; see Pet. App. 2.[2]

Petitioner did not file a claim to the property or a petition for remission of the forfeiture. Accordingly, in June and August 1994, the DEA administratively forfeited the seized items to the United States. Pet. App. 2, 6-7.

3. Before trial, petitioner moved to dismiss the superseding indictment, alleging that he had already been punished by the administrative forfeiture of the property and that his trial on the superseding indictment would violate the Double Jeopardy Clause's prohibition of multiple punishments for the same offense. A magistrate judge recommended that the motion be granted. Pet. App. 16-28. Relying on *United States* v. *$405,089.23 in United States Currency*, 33 F.3d 1210 (1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued Apr. 17, 1996), the magistrate judge found that the administrative forfeiture and the criminal prosecution were "separate proceedings" for purposes of the Double Jeopardy Clause and that petitioner had been punished by the administrative forfeitures even though he failed to file a claim to the forfeited property. Pet. App. 21-26. On that basis, the magistrate judge concluded that the criminal prosecution could not proceed without

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[2] In each instance, an individual acting as petitioner's agent acknowledged receipt of the notice at petitioner's home. In addition, the DEA received acknowledgement that an individual acting as petitioner's agent received two of the notices sent to petitioner's place of detention. Petitioner does not contend that he did not receive notice of the seizures and forfeitures. See Pet. App. 2.

violating the multiple punishments prong of the Double Jeopardy Clause. *Id.* at 27.

The district court agreed with the magistrate judge that the administrative forfeitures constituted "punishment" of petitioner, but it held that the prior "punishment" barred prosecution only of five counts of the indictment. See Pet. App. 9-15. In explaining that conclusion, the court examined the affidavit submitted by the government in support of the application for the warrant to search petitioner's property. That affidavit, the district court determined, established probable cause to believe that petitioner had committed the offenses later charged in Counts 1, 9, 10, 11, and 12 of the superseding indictment—the counts alleging that petitioner had conspired to distribute cocaine and that he had possessed cocaine with the intent to distribute it. The court concluded that the administrative forfeitures had been based on the information supporting those counts; that the forfeitures "punished" petitioner for the commission of those offenses; and that petitioner therefore could not receive additional punishment for those offenses in a separate criminal proceeding. *Id.* at 11-13. The district court held, however, that the remaining counts did not rest on "the same criminal acts upon which the administrative forfeitures proceeded," and that the Double Jeopardy Clause therefore did not bar a subsequent criminal prosecution on those counts. *Id.* at 13-14.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1-3. Relying on *United States* v. *Cretacci*, 62 F.3d 307 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996), the court held that petitioner had abandoned the seized property by failing to file a claim to it, and that the

administrative forfeiture of abandoned property "does not impose a 'punishment' for purposes of the Double Jeopardy Clause." Pet. App. 2. The court also found *Cretacci* to be dispositive of petitioner's argument that he could not have filed a claim to the seized property without compromising his Fifth Amendment privilege against compulsory self-incrimination. Because "a defendant's claim of ownership of property that was subject to forfeiture may not be used" at trial to prove the defendant's guilt, the court stated, the administrative forfeiture proceedings placed no burden on petitioner's exercise of Fifth Amendment rights. *Id.* at 3 (quoting *Cretacci*, 62 F.3d at 311). Finally, the court of appeals dismissed as "moot" petitioner's cross-appeal challenging the district court's refusal to dismiss five counts of the indictment. Pet. App. 3.

ARGUMENT

Petitioner contends (Pet. 11-23) that the Double Jeopardy Clause bars his criminal conviction on the offenses charged in the indictment after the forfeiture of the cash and property seized from him. The court of appeals correctly rejected that contention, and it does not warrant further review.[3]

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[3] Petitioner apparently seeks review by this Court of that portion of the Court's order that dismissed his cross-appeal. The merits of petitioner's cross-appeal are not properly before this Court, however, because the court of appeals lacked jurisdiction to consider it. As we explained in our opposition to the petition for certiorari filed in *Baird* v. *United States*, cert. denied, 116 S. Ct. 909 (1996) (No. 95-630), a multiple punishments claim, such as petitioner raises, is not subject to interlocutory appeal, because "that aspect of the [double jeopardy] right can be fully vindicated on an appeal following final

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court held that the civil forfeiture provisions at issue in that case are sufficiently punitive to be subject to review under the Excessive Fines Clause of the Eighth Amendment. The courts of appeals are currently divided with respect to the application of the Double Jeopardy Clause to successive criminal punishment and civil forfeiture based on the same underlying conduct, and this Court recently granted the government's petitions for certiorari in two cases that raise aspects of this issue. See *United States* v. *$405,089.23 in United States Currency*, *supra*; *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued Apr. 17, 1996).

Every court of appeals that has considered the issue has held, however, that a person who does not contest the forfeiture of property cannot claim to have suffered punishment as a result of that forfeiture. See *United States* v. *German*, 76 F.3d 315, 317-320 (10th Cir. 1996); *United States* v. *Idowu*, 74 F.3d 387, 392-396 (2d Cir. 1996); *United States* v.

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judgment." *Abney* v. *United States*, 431 U.S. 651, 660 (1977). We have supplied petitioner with a copy of our brief in *Baird*.

Sykes, 73 F.3d 772, 773-774 (8th Cir. 1996); *United States* v. *Baird*, 63 F.3d 1213, 1217-1219 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Cretacci*, 62 F.3d 307, 310-311 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994). Those courts have recognized that administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.[4] Thus, when the government gives notice that it intends to obtain the forfeiture of property, and the recipient of that notice fails to take appropriate steps to preserve his interest in the property, the government may consider the property abandoned or

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[4] Under 21 U.S.C. 881(d), the provisions of the customs laws governing summary forfeiture may be used against property that is subject to forfeiture under the controlled substances laws. See also 21 C.F.R. 1316.74-1316.77. The applicable customs statutes, 19 U.S.C. 1602-1621, provide for the administrative forfeiture of specified categories of seized property if the government publishes notice of seizure and intention to forfeit the property. If no claim is filed, the agency has the authority to declare the property forfeited without a judicial determination. See 19 U.S.C. 1609; 21 C.F.R. 1316.77. If a proper claim and bond (or proof of indigence) is filed, the agency seeking forfeiture must transmit the matter to the appropriate United States Attorney's Office to commence a judicial forfeiture action. See 19 U.S.C. 1608. To commence that action, the government files an in rem complaint against the property and publishes notice of the forfeiture proceeding. Any person who wishes to contest the judicial forfeiture must file a claim and an answer to the complaint. See Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims. In judicial forfeiture proceedings, a claimant may challenge the government's right to obtain forfeiture and may raise an innocent owner defense.

ownerless, at least by that person. As the Ninth Circuit has explained, "[j]ust as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights, the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *United States* v. *Cretacci*, 62 F.3d at 310-311 (citations omitted). See also *United States* v. *Baird*, 63 F.3d at 1218 ("Because Baird never asserted an interest in the money that was seized from his residence, he cannot now claim to have been punished by its forfeiture."); *United States* v. *Arreola-Ramos*, 60 F.3d at 192 (because only unclaimed property may be administratively forfeited, administrative forfeiture "punishes no one"); *United States* v. *Torres*, 28 F.3d at 1466 (administrative forfeiture does not impose punishment on person who fails to establish an interest in the forfeited property). Petitioner did not file a timely claim when the government initiated the administrative forfeiture of the cash seized from him, and his double jeopardy claim is therefore without merit.

Moreover, a person who fails to file a claim in response to a notice that the government will seek administrative forfeiture of property never becomes a party to any forfeiture proceeding. Even assuming that an individual may be placed "in jeopardy" other than in a criminal case, a person who has not participated in a proceeding cannot be said to have been placed "in jeopardy" within the meaning of the Double Jeopardy Clause. See *United States* v. *German*, 76 F.3d at 320 (jeopardy does not attach in administrative forfeiture proceeding); *United States* v. *Pena*, 67 F.3d 153, 155-156 (8th Cir. 1995) (defendant not placed in jeopardy by administrative forfeiture proceeding); *United States* v. *Arreola-Ramos*, 60 F.3d at 192

("Absent a trial, a party, and a punishment, jeopardy can never attach."); *United States* v. *Baird*, 63 F.3d at 1218 ("jeopardy does not, and cannot, attach until one is made a *party* to a proceeding"); *United States* v. *Torres*, 28 F.3d at 1465 ("As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach.'") (quoting *Serfass* v. *United States*, 420 U.S. 377, 391-392 (1975)). Petitioner's failure to file a claim therefore precludes a finding that he was in jeopardy or suffered punishment in the administrative forfeiture.[5]

2. Petitioner also argues (Pet. 13-19) that he could not have contested the administrative forfeiture without incriminating himself, and that the forfeiture therefore violated his rights under the Fifth Amendment. Petitioner failed, however, to assert his Fifth Amendment rights at the time the government gave him notice of the administrative forfeiture. Had petitioner made a valid and supported showing that he would be incriminated by making a claim to the seized property, he could have sought a stay of the forfeiture proceedings or a delay in the filing of a judicial

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[5] This Court has made clear that "the Double Jeopardy Clause * * * does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978). When a defendant makes a deliberate decision "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused," he cannot claim in a subsequent proceeding that he has been "twice put in jeopardy." *Ibid.*; see *Ricketts* v. *Adamson*, 483 U.S. 1, 10-12 (1987). By declining to file a claim to the seized property, petitioner avoided becoming a party to the forfeiture action. He therefore cannot claim that the subsequent criminal proceedings violated his rights under the Double Jeopardy Clause.

forfeiture action until the criminal charges against him had been resolved. See *United States* v. *Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991); *United States* v. *$250,000 in United States Currency*, 808 F.2d 895, 901 (1st Cir. 1987). Petitioner's "failure * * * to assert the constitutional privilege leaves him in no position to complain now that he [would have been] compelled to give testimony against himself." *United States* v. *Monia*, 317 U.S. 424, 427 (1943) (if an individual "desires the protection of the privilege, he must claim it").[6]

3. Petitioner contends (Pet. 19-23) that the Ninth Circuit should not have applied its holding in *Cretacci* "retroactively" in deciding his case. This Court has held, however, that in both civil and criminal cases, newly declared rules of law must be applied to all cases pending on direct review. *Griffith* v. *Kentucky*, 479 U.S. 314, 320-328 (1987); see *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993) (rule

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[6] In *Cretacci*, the Ninth Circuit held that a defendant's claim of ownership to property in a forfeiture proceeding may not be used to prove his guilt in a later prosecution for the offenses that gave rise to the forfeiture. See 62 F.3d at 311. The court relied on this Court's decision in *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that a defendant's claim of ownership to property at a pretrial suppression hearing may not be used to prove the defendant's guilt at trial. Judge Kleinfeld declined to join that portion of the court's opinion in *Cretacci*, arguing that the possibility that property may be lost unless the owner makes a claim in a forfeiture proceeding does not constitute compulsion within the meaning of the Fifth Amendment. See 62 F.3d at 311. Because petitioner did not make a timely assertion of his Fifth Amendment right, the validity of the approach adopted in *Cretacci* is not before the Court.

announced by the Court "is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule"); see also *Reynoldsville Casket Co.* v. *Hyde*, 115 S. Ct. 1745, 1748 (1995) (restating *Harper* holding). The Ninth Circuit was therefore correct in applying *Cretacci* to petitioner's case.

4. There is no reason to hold this case pending the disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23 in United States Currency*, No. 95-346. In *$405, 089.23*, the Ninth Circuit held that the civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment under the Double Jeopardy Clause. In *Ursery*, the Sixth Circuit held that the civil judicial forfeiture of property used to facilitate a drug crime under 21 U.S.C. 881(a)(7) always amounts to punishment for double jeopardy purposes. The government's brief in those consolidated cases argues that civil forfeiture followed by criminal prosecution does not raise double jeopardy concerns, that the forfeitures at issue do not constitute punishment, that civil forfeiture and the criminal offense on which it rests are never the "same offense" under the Double Jeopardy Clause, and that parallel civil forfeiture and criminal actions constitute a single proceeding for purposes of the multiple punishments prong of the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in *Ursery* and *$405,089.23* would provide additional grounds on which to reject petitioner's claims, a decision favorable to the respondents in those cases would not provide petitioner with

a basis for relief. The Ninth Circuit, which has taken the most expansive view of the application of the Double Jeopardy Clause to civil forfeiture proceedings, rejected petitioner's claim in this case. See also *United States* v. *Cretacci*, *supra*; *United States* v. *Washington*, 69 F.3d 401 (9th Cir. 1995). Accordingly, a decision adverse to the government in *Ursery* and *$405,089.23* would have no effect on the validity of the court of appeals' reasoning in the instant case.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

APRIL 1996

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[7] We note that this Court recently denied three petitions for a writ of certiorari that presented the question whether a criminal conviction following an administrative or other uncontested forfeiture violated the Double Jeopardy Clause. See *Baird* v. *United States*, 116 S. Ct. 909 (1996); *Penny* v. *United States*, 116 S. Ct. 931 (1996); *Nakamoto* v. *United States*, No. 95-7313 (Apr. 1, 1996); see also *Smith* v. *United States*, cert. denied, No. 95-6830 (Apr. 1, 1996) (uncontested judicial forfeiture following criminal conviction).

(3)

95-1243

No. _____

Supreme Court, U.S.
FILED
FEB 1 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	Nos. 94-30421 94-30422
Plaintiff-Appellant, Cross-Appellee,	D.C. No. CR-94-036-01-JWS
v.	
GERALD FRANK PLUNK,	MEMORANDUM*
Defendant-Appellee, Cross-Appellant.	

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted June 5,1995
Submission Deferred June 13, 1995
Resubmitted September 20,1995
Seattle, Washington

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

We have jurisdiction over this interlocutory appeal. United States v. Chick, 61 F.3d 682 (9th Cir. 1995).

In United States v. Cretacci, 62 F.3d 307 (9th Cir.1995), we held that if property seized by an agency under the administrative forfeiture procedure, 19 U.S.C. § 1609(a), is

not claimed within a specified time limit, the property is declared "forfeited" and may be sold. The administrative forfeiture of unclaimed property simply constitutes the taking of abandoned property, and as such, does not impose a "punishment" for purposes of the Double Jeopardy Clause. Id. at 310.

In this case, Plunk does not dispute that he received notice of the Government's intent to seek forfeiture of the property seized from his home and his person and that he had to file a claim to preserve any right he had to that property. The required notice was also published in USA Today. Plunk did not file a claim and the property was administratively forfeited. If no claim is filed, the Government has the authority to declare the property forfeited without a judicial adjudication. See 19 U.S.C. § 1609; 21 C.F.R. § 1316.77. This declaration has "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States." 19 U.S.C. § 1609(b). In other words, administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.

Because Plunk did not assert any claim to the seized property, he was not punished when it was forfeited. Further, because Plunk was not a party to the prior administrative forfeiture, he was not in jeopardy and his trial and punishment in the criminal prosecution would not amount to double jeopardy.

Plunk responds that he was forced not to formally contest the civil forfeitures (and thus suffer punishment) to protect his Fifth Amendment privilege in the pending criminal case. He argues that although the notices of seizure did not specify the owner, the actual judgments of forfeiture listed his inmate number and adjudicated him as the owner.

In Cretacci, we rejected "the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy." Id. at 311. The court pointed out

that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt." Id. Similarly, "a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." Id.

Therefore, Plunk is in no different a position than a criminal defendant who wishes to suppress contraband seized from him. Such a defendant must assert ownership of the property in order to claim that its seizure invaded his rights under the Fourth Amendment. See United States v. Salvucci, 448 U.S. 83 (1980).

Further, there was no "adjudication" of Plunk's ownership of the cash, gold, firearms and watch. The two declarations of forfeiture do contain computer-generated information at the top of the documents stating the seizure number, case number, item(s) seized, value, seizure date and place, judicial district, and note: "OWNER: PLUNK, GERALD F.," "SEIZED FROM: PLUNK, FRANK (INMATE #7603)." However, these notations do not rise to the level of a judicial adjudication of ownership where a claim or a petition for remission or mitigation has not been filed.

In light of the rationale set forth in Cretacci, we hold that the forfeiture of Plunk's abandoned property was not a "punishment," and thus Plunk was not placed in jeopardy. Accordingly, the subsequent criminal prosecution is not barred by the Double Jeopardy Clause. Because we reverse the district court's order dismissing the five of twelve counts on the grounds of double jeopardy, Plunk's cross-appeal of the district court's denial of his motion to dismiss the entire indictment is moot and is therefore dismissed.

REVERSED AND REMANDED IN PART, DISMISSED IN PART.

FILED
NOV 17 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A94-036 CR (JWS)
Plaintiff,	)
v.	) ORDER FROM CHAMBERS
GERALD FRANK PLUNK, et al.,	) (Motion to Dismiss - Docket 185)
Defendant.	)

MOTION PENDING

Defendant Gerald Frank Plunk ("Plunk") filed a motion at docket 185 requesting dismissal of all charges in the superseding indictment against Plunk on the grounds that his prosecution would violate the Double Jeopardy Clause of the Fifth Amendment. The motion does not involve Plunk's co-defendant, Timothy Pierson ("Pierson"). Magistrate Judge John Roberts, to whom the motion was referred for a report and recommendation pursuant to Local Magistrate Rule 4, has

recommended that the motion be granted. This court reviews de novo.[1]

PROCEDURAL POSTURE

Plunk and Pierson were to have been tried on October 31, 1994. Plunk filed his double jeopardy motion on October 26, 1994.[2] No matter how this court may decide the double jeopardy motion, trial as to Plunk should not proceed until after the completion of an expedited review in the Court of Appeals. See Abney v. United States, 431 U.S. 651, 662 N.8 (1977). Trial in this case is expected to take several weeks and will involve many witnesses who must be transported to Alaska from as far away as the East Coast. The interest in trying Plunk and Pierson in a single trial is especially strong.

Following a conference with counsel and a hearing on the record, the trial date for both defendants was continued until January 3,1995. Application of the Speedy Trial Act makes it virtually impossible to delay Pierson's trial beyond that date. This court set a briefing schedule allowing for the

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[1]Ordinarily, in this District, following an initial report and recommendation from a magistrate judge, the parties have an opportunity to file objections and responses to objections which are considered by the magistrate judge before he or she issues a final report and recommendation. Here the requirement for expedited pre-trial review in the Court of Appeals, United States v. Abney, 431 U.S. 651, 662 n.8 (1977), and the time constraints of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., have required this court to consider the objections and responses as part of its de novo review without a final report and recommendation from the magistrate judge.

[2]Plunk's counsel cannot be seriously faulted for filing the motion late, because it is based upon an evolving area of the law which is only now coming to the attention of counsel. Indeed, were the potential double jeopardy ramifications of civil forfeitures apparent earlier, it is highly unlikely the government would have risked its prosecution of Plunk on charges which could produce a term of incarceration exceeding 30 years and a fine of up to $4,000,000 in order to secure administrative forfeitures of chattels whose combined estimated worth is less than $16,170.

entry of this order no later than November 17, 1994, which should afford enough time for expedited appellate review. See United States v. Miranda-Parra, 637 F.2d 610 (9th Cir. 1980) (expedited double jeopardy appeal decided in 32 days). It is hoped that the appeal will be decided in time to allow a single trial to proceed on January 3, 1995.

BACKGROUND

On March 22, 1994, a one-count indictment charging Plunk with conspiracy to distribute cocaine in Alaska from the "Fall of 1987 until no later than April, 1991" in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Alaska I conspiracy") was returned. Plunk was arrested on March 25, 1994. On April 26, 1994 a superseding indictment was filed.

The superseding indictment contains 12 counts: Count 1 charges Plunk and Pierson with conspiracy to transport cocaine shipped from Columbia [sic] across the "Lower 48" states of the Union from April 1, 1993, until December 31, 1993 in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Lower 48" conspiracy). Count 2 charges Plunk with engaging in a continuing criminal enterprise from about April 1993 through December 1993 in violation of 21 U.S.C. § 848. Counts 3 through 6 charge Plunk with using a communications facility to facilitate drug trafficking in violation of 21 U.S.C. § 843(b). Counts 7 and 8 charge Pierson with violating 21 U.S.C. § 843(b). Counts 9 through 11 charge Plunk with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Count 12 charges Plunk with conspiracy to distribute cocaine in Alaska from the Fall of 1980 until December 31 1993 (the "Alaska II" conspiracy).

In the meantime, agents of the Drug Enforcement Administration ("DEA") seized certain items or personal property pursuant to 21 U.S.C. § 881, which were later declared forfeit to the United States pursuant to 19 U.S.C. § 1609 as follows: On March 25, 1994, a Rolex wristwatch valued at $1,500 was the subject of Seizure # 152090 and declared forfeit on June 3, 1994. On March 24, 1994,

assorted firearms valued at $4,040 were the subject of Seizure # 152183 and declared forfeit on June 10, 1994. On March 24, 1994, currency in the amount of $9,660 was the subject of Seizure # 152199 and declared forfeit on June 24, 1994. On March 24, 1994, three small bags of placer gold valued at $967.89 were the subject of Seizure # 152824 and declared forfeit on August 24, 1994.

The declarations of forfeiture all identify Plunk as the property's owner at the time of seizure.[3] Further, as the notices of seizure state, all the property was seized "because it was used or acquired as a result of a drug-related offense." All of the property, save the Rolex, was found at Plunk's residence on March 24, 1994, when officers executed a search warrant. The Rolex was taken from Plunk when he was arrested on March 25, 1994. According to the Declaration of William J. Snider, Forfeiture Counsel of DEA, each of the above four seizures was accepted for administrative forfeiture based upon an evaluation process described in his declaration.

An additional forfeiture proceeding involving Plunk's property is pending. On September 8, 1994, the government filed its complaint in United States v. Four Aircraft, Case No. A94-401 CIV (JKS). The case is before Judge Singleton of this District. There, the Government seeks forfeiture of four aircraft registered to Plunk on the grounds that they are "property or proceeds traceable to an exchange for controlled substances in violation of 21 U.S.C. § 801 et seq."[4] According to the Government, "The facts and circumstances supporting the seizure and forfeiture of the defendant aircraft and parts are contained in (the attached) Affidavit of Special

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[3]Plunk did not contest the forfeitures. His briefing indicates that the decision not to file a claim to the property was made in order to preserve his Fifth Amendment right not to testify.

[4] Verified Complaint For Forfeiture at ¶ 1, Case No. A94-401 CIV (JKS).

Agent Robert E. Cayford of [DEA].[5] On September 23, 1994, Plunk filed a claim in the action asserting ownership of the four planes.

On October 27, 1994, the Government moved to stay, or alternatively, to dismiss Four Aircraft pending disposition of its request for en banc reconsideration of the decision by the Court of Appeals for the Ninth Circuit in United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994). The general averment that the forfeiture of the four aircraft is based upon the violation of 21 U.S.C. § 801 et seq., coupled with the information in the September 8, 1994, affidavit of DEA Special Agent Robert Cayford which is incorporated into the complaint by reference, indicates that the forfeiture of the aircraft is sought on the basis of Plunk's participation in the Alaska conspiracies and the Lower 48 conspiracy as well as upon possession of cocaine with intent to distribute. In the motion for stay, the Government represented that the charges in the instant criminal prosecution are the same violations underpinning the civil forfeiture sought in Four Aircraft.

On November 16, 1994, Judge Singleton issued an order which stayed further proceedings in Four Aircraft pending the outcome of all criminal prosecutions of Plunk. Obviously, Judge Singleton found this course of action more appropriate than either staying the matter pending disposition of the en banc request in $405,089.23, 33 F.3d at 1210, or dismissing the civil forfeiture action without prejudice as requested by the Government.

Given the stay in Four Aircraft, this court concludes that Plunk has not yet been punished in the judicial forfeiture and that he is not presently subject to the burden of defending multiple proceedings asserting commission of the same offenses. For these reasons the continued prosecution of Plunk on the charges in the superseding indictment is not foreclosed on double jeopardy grounds by the judicial

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[5] Id. at ¶ 9. The facts and circumstances recounted by Mr. Cayford include alleged transactions which form part of each of the two alleged conspiracies.

forfeiture action in Four Aircraft. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

DISCUSSION

The magistrate judge recommended that Plunk's double jeopardy motion be granted at docket 208. Based upon this court's de novo review, with the exception of the implied finding of fact and related conclusion of law that the administrative forfeitures are based upon all the same offenses as those with which Plunk is charged in the superseding indictment, the findings and conclusions made by the magistrate judge are correct and are adopted. The implied factual finding and related conclusion that the administrative forfeitures are based upon the same offenses requires discussion.

To bar subsequent prosecution, of course, a forfeiture must be based on the same offense charged in the indictment. $405,089.23, 33 F.3d at 1216. The Supreme Court recently explained that the only proper way to test for the "sameness" of two crimes is to compare the individual elements of each. If there is not at least one different element, then the crimes are the same offense for double jeopardy purposes. United States v. Dixon, __ U.S. __, 113 S.Ct. 2849, 2856 (1993). In overruling Grady v. Corbin, 495 U.S. 508 (1990), the Dixon Court held that, even if proof of one of the elements of the second crime will involve proof of the same conduct underpinning an element of the first crime, there is no double jeopardy problem so long as at least one element is not common to both.

The Government argues that application for the same element test to the completed administrative forfeitures and the crimes charged in the superseding indictment discloses that prosecution of Plunk as charged, will not expose him to double jeopardy. With regard to the conspiracy counts in the superseding indictment, this court understands the Government's argument to be as follows. According to the Snider declaration, the administrative forfeitures were all based upon alleged violations of 21 U.S.C. § 841(a)(1)

which criminalizes the possession of cocaine with intent to distribute. Violation of 21 U.S.C. § 841(a)(1) is a crime whose elements do not include the element of agreement, which is required for any conspiracy so the crimes charged in counts 1 and 12 differ from the conduct upon which the forfeitures were based according to Snider's explanation.

At most, the Government would acknowledge some merit to the proposition that the administrative forfeitures did implicate the Alaska I and Alaska II conspiracies.[6] This concession would be consistent with the fact that the Snider declaration also indicates that the forfeitures proceeded based upon Plunk's arrest. Plunk was arrested because he was charged in the original indictment with participation in the Alaska I conspiracy.

So long as the administrative forfeitures are not seen to involve more than distribution of cocaine in Alaska and the Alaska I conspiracy, the Government is correct, because a comparison of the Alaska I conspiracy described in the original indictment and the "Lower 48" conspiracy charged in count 1 and the Alaska II conspiracy charged in count 12 shows that the elements to be proved are different. To prove the Alaska I conspiracy, the Government would have to prove agreement to distribute cocaine in Alaska from the Fall of 1987 until no later than April of 1991. In contrast, to prove guilt on Count 1, the Government would have to prove that Plunk agreed with someone else to distribute cocaine across the "Lower 48" from about April of 1993 until December of 1993. To prove the Alaska II conspiracy charged in count 12, the Government would have to prove that Plunk agreed with someone to distribute cocaine in Alaska from the Fall of 1980 until December of 1993. The three conspiracies charged depend on proof of demonstrably different agreements and are, therefore, different crimes.

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[6] The government makes little of the differences between these two conspiracies, which the government calls simply the "historical" conspiracy. The government term for the Lower 48 conspiracy is the "Columbian" [sic] conspiracy.

Count 2 charging continuing criminal enterprise involves several elements not included in either the violation of 21 U.S.C. § 841(a)(1), cited directly by Snider, or the Alaska I conspiracy indirectly involved by Snider, as the bases for the administrative forfeitures. See 21 U.S.C. § 848. Counts 3 through 6 charge that Plunk used communication devices to facilitate drug trafficking. Again it is apparent that the elements of the crime are different from either possession with intent to distribute or conspiracy to distribute cocaine. See 21 U.S.C. § 843(b).

Counts 9,10, and 11 charge Plunk with possession with intent to distribute cocaine, the very crime upon which Snider says the administrative forfeitures proceeded, but the distribution charged involves transactions associated with the Lower 48 conspiracy, not the Alaska I conspiracy charged in the original indictment extant at the time of the seizures. Thus, it would appear that these three counts need not be dismissed if one accepts the Government's analysis of the forfeiture proceedings.

The difficulty with the Government's analysis is that it depends upon accepting at somewhat less than full face value an explanation of the bases for the four administrative forfeiture proceedings offered by DEA counsel Snider which is not entirely consistent with all of the available information, including information referenced by Mr. Snider. According to the Snider declaration, the decision to accept each of the four cases for administrative forfeiture was made at the end of an evaluation process which "included a legal review of the probable cause that existed to seize [the item seized]." Snider declaration at ¶¶ 4(a), 5(a), 6(a), and 7(a).

Evidence of what probable cause was used to support the three property seizures at Plunk's residence[7] is found in the March 22, 1994, affidavit of DEA special agent Cayford used to obtain the search warrant for the residence. Cayford's affidavit is not limited to asserting probable cause to believe

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[7] These were the seizures of the $9,660 in U.S. currency, the firearms, and the placer gold.

Plunk is guilty only of simple possession with intent to distribute or participation in the Alaska I conspiracy. The Cayford affidavit recites probable cause to believe facts that would support Plunk's participation in the Alaska I conspiracy, the Alaska II conspiracy, and the Lower 48 conspiracy.

The information Cayford attributes to Warren Jeff Funderburk at ¶ 1 of the Background section of his affidavit indicates that on 10 to 15 occasions between Fall of 1988 and Spring of 1990, Plunk sold kilogram quantities of cocaine to Funderburk, who then resold the drug. This information appears relevant to either the Alaska I or Alaska II conspiracies, as well as to possession with intent to distribute in Alaska. At ¶ 2 of the affidavit, Cayford attributed information to an anonymous source who described himself as a facilitator in the Plunk transfers to Funderburk.[8] The information Cayford attributes to Hal Booher at ¶¶ 3 and 4 concerning repeated interstate deliveries of 200 to 220 kilogram loads of cocaine is information associated with the Lower 48 conspiracy, as well as with possession with intent to distribute somewhere outside Alaska. The assertions in ¶ 4(D) that Booher met Plunk in November 1983 and that Booher learned Plunk distributed cocaine in Alaska appear to establish a pattern of distribution more likely consistent with the Alaska II conspiracy than the Alaska I conspiracy.[9] The

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[8] The size of Plunk's sales to Funderburk, the participation of a third party as a "facilitator," and the resale by Funderburk all imply that Plunk had some sort of agreement regarding the distribution and, hence, was participating in a conspiracy.

[9] It may first be observed that in isolation this paragraph is equally consistent with simple possession and distribution. The absence of quantity information, such as the kilogram sales to Funderburk, and the absence of any information that the sales involved a "facilitator" makes this information consistent with simple distribution not involving an agreement with others. However, in the overall context of the affidavit, it seems as likely to evidence the outcome of joint effort as sales by Plunk acting alone. As to the question of whether the information relates to the Alaska I or Alaska II conspiracies, the way the paragraph is written leaves unclear when Booher learned of Plunk's participation in cocaine distribution in Alaska. It is clear Booher met Plunk in November of

information in ¶ 5 clearly relates to distribution in Alaska and, combined with the other information, may also relate to either the Alaska I or Alaska II conspiracies.

The fourth seizure made at the time of Plunk's arrest necessarily proceeded on the basis that Plunk was properly arrested. Thus, seizure of the Rolex appears to have been based upon probable cause to believe that Plunk had committed the crime charged in the original indictment--participation in the Alaska I conspiracy.

This court finds that the crimes the Government had reason to believe Plunk had committed at the time of the seizures and upon which the administrative forfeitures proceeded were that Plunk possessed cocaine with intent to distribute it in Alaska, that Plunk possessed cocaine with intent to distribute it somewhere outside Alaska, and that Plunk was a member of the Alaska I, Alaska II and Lower 48 conspiracies. When this finding is coupled with the other findings and conclusions reached by the magistrate judge and adopted by this court, it follows that counts 1, 9, 10, 11 and 12 must be dismissed, because Plunk cannot be put in jeopardy on charges for which he has already been punished. The remaining counts being constituted neither of the same criminal acts upon which the administrative forfeitures proceeded, nor criminal acts comprised of the same elements under the Dixon test, should not be dismissed. Prosecution of Plunk on counts 2 (continuing criminal enterprise), and counts 3 through 6 (communications facility used in drug trafficking) may proceed without violating the Double Jeopardy Clause.

Plunk invites this court to hold that count 2 through 6 must be dismissed. He makes several points. First, each Notice of Seizure recites that the subject property "was seized by Special Agents of the [DEA] for forfeiture under [21 U.S.C. § 881] because it was used or acquired as a result of a

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1983. Thus, it is a more natural reading of the paragraph to conclude that Plunk was involved in distributing cocaine in Alaska prior to the inception of the Alaska I conspiracy in Fall of 1987.

drug-related offense. (See [21 C.F.F. § 1316.91(d)] for the definition of the term 'drug-related offense.')" (Boldface in original.) The regulation cited in the notices to define the crime supporting the forfeitures provides:

> The term Drug-Related Offense means any proscribed offense which involves the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited by Title 21 U.S.C.

21 C.F.R. § 1316.91(d).

Plunk also points out that only two of the administrative forfeitures were the subject of notice of forfeiture letters sent prior to the return of the superseding indictment on April 26, 1994. The letter concerning the Rolex was sent to Plunk and to the publisher on April 18, 1994. The letter concerning the firearms was sent on April 25, 1994. The other two letters concerning the $9,660 and the placer gold were not sent until May 9, 1994. However, there is nothing in the letters which purports to retroactively alter the basis for the seizures, all four of which antedate the superseding indictment.

Plunk also notes that in each of the four proceedings, the Declaration of Forfeiture fails to recite the specific crime upon which the forfeiture was predicated. Each merely indicates that the property was seized pursuant to 21 U.S.C. § 881, that notice was given pursuant to 19 U.S.C. § 1607, and that the property is declared forfeit pursuant to 19 U.S.C. § 1609.

Plunk is correct to the extent that the statutory and regulatory underpinnings of the seizures are consistent with forfeitures based upon all of the crimes charged in the superseding indictment; these authorities are written broadly to embrace any violation of 21 U.S.C. § 801 et seq. However, Plunk is incorrect to the extent that he maintains the facts show the administrative forfeitures were based upon the

continuing criminal enterprise and use of communication facility crimes. The probable cause supporting the seizures did not include information supporting the continuing criminal enterprise and communication facility crimes.

Plunk advances additional arguments, including arguments based on the concepts of waiver and estoppel. This court has considered all of Plunk's other arguments and finds them to be without merit.

CONCLUSION

For the reasons set forth above and for the reasons provided in the report and recommendation at docket 208, the motion at docket 185 is **GRANTED IN PART** and **DENIED IN PART** as follows: Counts 1, 9, 10, 11, and 12 are dismissed. Counts 2 through 6 inclusive remain set for trial on January 3, 1995.

Any party not satisfied with this court's decision shall immediately take an expedited appeal as contemplated by United State [sic] v. Abney, 431 U.S. 652, 662 n.8 (1977). The Clerk is directed to expedite preparation of whatever record on appeal the parties may designate. The parties are authorized to designate documents filed in Case No. A94-401 Civ (JDS) for inclusion in the record on appeal in this action. The Clerk shall call counsel immediately upon filing of this order and counsel shall promptly obtain copies.

DATED this 17th day of November, 1994 at Anchorage, Alaska.

/S/

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
NOV 4 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A94-036 CR (JWS)
Plaintiff,	)
v.	) RECOMMENDATION REGARDING MOTION TO
GERALD FRANK	) DISMISS ON GROUNDS OF DOUBLE JEOPARDY
Defendant.	) (Document No. 185)

Defendant **GERALD FRANK PLUNK** moves for an order barring his prosecution in the instant case on grounds of double jeopardy. Plunk contends that his further prosecution violates the Fifth Amendment's Double Jeopardy Clause because he has already been placed in jeopardy in administrative and civil forfeiture proceedings. Docket No. 185. The government opposes the motion at Docket No. 189.[1] For reasons stated below, I recommend that the Motion to Dismiss be GRANTED.

[1] The following additional pleadings were filed:

Docket No. 193, Defendant's Supplemental Exhibits in Support of Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy; *Docket No. 196*, Government's Response to Defendant's Motion for Continuance Pending Interlocutory Appeal on Grounds of

BACKGROUND

Gerald Plunk was indicted on March 23, 1994, for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Mr. Plunk was arrested March 25, 1994, and detained in custody pursuant to a pretrial detention order. At the detention hearing the government presented evidence and argued that certain items (hand guns, currency in a heat-sealed package, placer gold, passport) hidden in Plunk's residence were incriminating. Agents of the Drug Enforcement Administration (DEA) executed search warrants as follows: A94-049 MJ issued March 22, 1994 for A-Frame single residence, 14940 Long Bow Drive, Anchorage; A94-051 MJ issued April 5, 1994 for Big Mountain Lodge, Iguigig, Alaska; A94-056 MJ issued April 5, 1994 for Safe Deposit Box #190 FNBA-Main Branch, Anchorage; A94-095 MJ issued April 26, 1994 for Fly-in Cabin, Hock Lake; and A94-096 MJ issued April 26, 1994 for Floor Safe, 2101 W. 29th Ave # 27, Anchorage. Subsequently, the government seized four (4) airplanes at the lodge and certain real property. Publication of Notice of Seizures were made in late May and early June, 1994.

The government issued Notices of Seizure for property seized March 24, 1994 from Gerald Plunk as follows:

Nine (9) assorted weapons valued at $4,040;

Double Jeopardy; *Docket No. 197*, Government's Supplementary Response to Defendant's Motion to Dismiss; *Docket No. 198*, Supplemental Briefing Regarding Divestiture of Jurisdiction Pending Appeal on Double Jeopardy Issue; *Docket No. 202*, Defendant's Reply to Government's Opposition and Government's Supplemental Opposition to Motion to Dismiss on Grounds of Double Jeopardy; *Docket No. 203*, Defendant's Request for Evidentiary Hearing. Defendant's Supplemental Reply to Government's Opposition and Government's Supplemental Opposition to Motion for Order Barring Further Prosecution of Grounds of Double Jeopardy was filed in Open Court on November 3, 1994.

$9,660 in currency; and

Placer gold valued at $967.89.

First publication of this property occurred in May 1994. See Exhibits A, B and C to Defendant's Motion for Order Barring Further Prosecution, Docket No. 185. A separate Notice of Seizure was published April 27, 1994, for a

> *Rolex wristwatch valued at $1,500*, seized from Gerald Plunk on or about March 25, 1994.

See Exhibit D, Docket No. 185.

A Declaration of Forfeiture was issued by the Senior Attorney, Office of Chief Counsel, Asset Forfeiture Section of the Department of Justice for the Rolex wristwatch on June 3, 1994 and for the $9,660 in currency on June 24, 1994. See Exhibit B to Government's Supplementary Response, Docket No. 197. The nine (9) firearms and the placer gold were also forfeited administratively on June 10, 1994 and August 19,1994, respectively. See Exhibits E and F attached to Plunk's Notice of Additional Exhibits, Docket No. 205. These declarations indicate that no claims were filed for said property.

A superseding indictment filed April 26, 1994, added a co-defendant Timothy Pierson. It alleges charges against Plunk of continuing a criminal enterprise (21 U.S.C. § 848), illegal use of a communication facility (21 U.S.C. § 843(b)), possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1) and a second conspiracy to distribute cocaine (21 U.S.C. § 846). Count two of the superseding indictment seeks to forfeit a (different) bag of currency and various described pieces of real estate allegedly constituting or derived from drug trafficking proceeds during the continuing criminal enterprise pursuant to 21 U.S.C. § 853 and 848.

On September 8, 1994, the United States filed a verified complaint to enforce the provisions of 21 U.S.C. § 881(a)(6) for forfeiture of four (4) aircraft traceable to an

exchange for controlled substances in violation of 21 U.S.C. § 801 et seq. See United States v. Four Aircraft, etc., Case No. A94-401 Civil (D.Alaska). The complaint alleged Gerald Plunk as the registered owner of the aircraft. The in rem complaint relied upon the same investigation as led to Plunk's indictment. Plunk filed a Notice of Claim on September 23, 1994. On October 27, 1994, the government moved for a stay of proceedings pending the outcome of Plunk's criminal prosecution.

DISCUSSION

Plunk contends that jeopardy attached when the government adjudicated administrative forfeitures of property seized by the government as a result of the underlying alleged criminal conduct. He contends that he was forced to suffer the forfeiture of his personal property in order to maintain his constitutional right to remain silent and avoid self-incrimination. He objects to further proceedings of the criminal trial including empaneling of the jury. Plunk argues that he has already been punished as a result of seizures and administrative forfeiture of his personal property. He seeks an order dismissing the indictment as to him with prejudice.

The government responds that the seizure of the property does not constitute "punishment" or consecutive proceedings as defined by case law. Government's Response, Docket No. 189, p.2. The government argues that administrative forfeitures are distinct from civil forfeitures with respect to the Double Jeopardy Clause of the Fifth Amendment. It claims that Plunk has not been "punished" by the administrative forfeiture of property to which he made no claim. The issue posed is whether the Double Jeopardy Clause of the United States Constitution is implicated. This determination is grounded in the facts of the particular case, as well as the nature of the law under which the sanctions were imposed.

In drafting the initial version of what came to be the Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment. He stated "No person

shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." United States v. Halper, 490 U.S. 435, 440 citing 1 Annals of Cong. 434 (1789-91) (Gales Ed. 1934).[2] The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. In Re Kurth Ranch, 986 F.2d 1308, 1310 (9th Cir. 1993), affirmed 114 S.Ct. 1937 (1994); United States v. Halper, 490 U.S. 435, 440 (1989). Plunk's motion implicates the third of these protections.

The multiple-punishment prohibition applies when the government attempts to criminally punish a defendant twice for the same offense. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The clause does not bar the government from imposing both a civil and a criminal penalty upon a defendant for the same offense. Helvering v. Mitchell, 303 U.S. 391 (1938). However, where the government seeks to impose not only a criminal sanction, but also a civil sanction in a separate proceeding that can be understood as punitive, the Double Jeopardy Clause is violated. See United States v. Halper, 490 435, 448 (1989); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).[3]

To determine whether criminal prosecution violates the Fifth Amendment in light of the forfeiture proceedings, the court must consider two questions: Whether the criminal prosecution and the civil forfeiture actions constitute separate

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[2] Halper involved a medical doctor who had been convicted and punished under the Criminal False Claim statute, 18 U.S.C. § 287 for filing false MediCare claims. The court considered whether he could be fined for the same false claims under the civil provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731. The court held that the Double Jeopardy Clause prevented it, to the extent that the fine exceeded what was needed to cover "legitimate non-punitive governmental objectives." 490 U.S. at 448.

[3] A Motion for Rehearing En Banc filed on or about October 20, 1994 is pending.

"proceedings," and whether civil forfeiture under 21 U.S.C. § 881(a)(6) constitutes "punishment." United States v. $405,089.23 U.S. Currency, 32 F.3d 1210, 1216 (9th Cir. 1984).

A. Separate Proceedings

The government's efforts in characterizing the proceedings as one coordinated prosecution fails under contemporary Ninth Circuit law. The government's characterization of a forfeiture as "administrative" does not preclude this conclusion. In the Ninth Circuit, parallel proceedings are separate proceedings, not the "same proceedings." $405,089.23 U.S. Currency, at 1216. In that case the Ninth Circuit relying on Jeffers v. United States, 432 U.S. 137 (1977) rejected the contrary view of the Second and Eleventh Circuits. "[A] civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate 'proceeding'." $405,089.23 U.S. Currency, at 1218. In the instant case the forfeiture actions were before different fact-finders and different judges. Recently, a sister court concluded that the government's characterization of a forfeiture as "administrative" does not preclude this conclusion. Quinones-Riuz v. United States, 1994 WL 531313 (S.D.CA.)

B. Administrative Forfeitures As Punishment

Next, the court must determine whether any of the administrative forfeitures actions constitute "punishment." Administrative forfeitures have been declared as to the Rolex Watch, $9,660 in currency, gold nuggets and nine (9) firearms. No claims were filed in response to the Notice of Seizures for these properties. The government argues that the civil penalties imposed in these related administrative forfeiture actions, do not constitution [sic] "punishment" for the purpose of the Double Jeopardy Clause because judgment in the forfeiture proceedings was obtained by default and thus there is no showing that Plunk has been deprived of any of his property.

The government cannot seriously argue that the administrative forfeitures in this case do not refer to property associated with the criminal defendant. The search warrants authorized searches of Plunk's property; the seizure notices reference Plunk, and the underlying investigation; and the indictment ties the property to Plunk. The record shows that Plunk was arrested for conduct giving rise to the administrative seizures and forfeitures as well as the indictment. The government's evidence at the bail hearing linked some of the personal property forfeited to Plunk. The government wants the court to find that Plunk has not been "punished" through civil forfeitures because he was not a party to those proceedings. At the same time the government would deny him standing to assert a claim unless he waived his Fifth Amendment rights to assert standing. The government cannot have it both ways.

Plunk relies on the government's use of seized evidence at the bail hearing to illustrate that some of the property referenced in the administrative forfeiture actions is the same property and relates to the same offenses for which he is being prosecuted. At the bail hearing the government argued that Plunk was using the firearms and money to facilitate the underlying conspiracy to traffic in controlled substances. Plunk refers to the bail hearing to show the interplay of his right against self-incrimination in the civil forfeiture proceedings and in the criminal prosecution.

The government analogizes this situation to one where a defendant "successfully avoids adjudication of his guilt." "Jeopardy" does not focus upon the resulting adjudication, but rather upon the defendant's position of having to defend. The mere filing of an indictment does not create jeopardy; the government may dismiss the charge without prejudice to re-instituting further prosecution for the same charge.

The Supreme Court has recognized a common understanding that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. 490 U.S.

at 447. Under Halper it is the purpose actually served by the sanction imposed on the individual not the underlying nature of the proceeding giving rise to the sanction that must be evaluated in determining whether a particular civil sanction constitutes criminal punishment. Id, n.7. The labels "criminal" and "civil" are not significant in determining whether a sanction constitutes punishment for double jeopardy purposes. $405,089.23 U.S. Currency, at 1218; Quinones-Ruiz v. United States, 1994 WL 531313 (S.D.CA.) (Forfeiture of convicted plaintiff's currency constituted a second punishment in violation of plaintiff's right under the Fifth Amendment to be free from double jeopardy). A legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character for double jeopardy purposes. Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994); Halper, supra. Under Halper, a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. Austin v. United States, 113 S.Ct. 2801, 2806 (1993); $405,089.23 U.S. Currency, at 1219. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retribution or deterrent purposes, is punishment. . . ." Halper, 490 U.S. at 448.

The Supreme Court recognizes that statutory in rem forfeiture may impose punishment. Legislative history of 21 U.S.C. § 881 recognizes that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." Senate Report No. 98-225, p. 191 (1983). The constitutional protection against double jeopardy is intrinsically personal. Halper.

The Ninth Circuit affirmed the district court's denial of a motion to dismiss the indictment on the grounds of double jeopardy holding that forfeiture of property used to grow marijuana was not a double jeopardy bar to the prosecution. See United States v. McCaslin, 959 F.2d 786 (9th Cir. 1992), cert. denied 113 S.Ct. 382 (1992). The Ninth Circuit held that Halper had no application to the ancient practice by which

instrumentalities of a crime may be declared forfeit to the government. 959 F.2d at 788. Subsequently, the Ninth Circuit recognized in United States v. $405,089.23 U.S. Currency, that the Supreme Court in Austin rejected the McCaslin analysis. The Supreme Court stated:

> "In light of the historical understanding of forfeitures as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose."

Austin, 113 S.Ct. at 2812, citing Halper, 490 U.S. at 448. See $405,089.23 U.S. Currency, 33 F.3d at 1219. Most recently, Judge Dwyer granted McCaslin's motion to vacate conviction and sentence under 28 U.S.C. § 2255 for the reason that the criminal sentence, imposed in a separate proceeding more than a year after judgment was entered forfeiting his residential real property under 21 U.S.C. § 881(a)(7), constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. See United States v. Duane B. McCaslin, 1994 WL 494764 (W.D.WA. 1993).

Even though the forfeiture proceedings in the instant case were commenced before the Ninth Circuit rendered its opinion in $405,089.23 U.S. Currency, the Halper -- Austin analysis, provided the test to determine whether a civil forfeiture under 21 U.S.C. § 881 constituted "punishment." In Austin the Supreme Court employed the Halper test which it used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause in determining whether the excessive fines clause applied. The Ninth Circuit in $405,089.23 U.S. Currency merely restates what the Supreme Court's decision in Austin made clear that Halper's double jeopardy protections apply to most civil forfeiture cases. The government was not free to ignore Austin but rather should have looked to the entire applicable statute to determine whether a forfeiture constitutes

"punishment" rather than dwelling on the nature of the property sought to be forfeited. Austin rejected a case-by-case approach to determine whether forfeiture constitutes "punishment." 113 S.Ct. at 2812, n.14.

The Austin court focused on 21 U.S.C. §§ 881(a)(4) and (a)(7). The court identified the punitive purpose of the sections on the culpability of the owner. Significant to the court was the fact that the statute expressly provided an innocent owner defense. It authorizes forfeiture only where the owner is himself involved in illegal activity. See Austin, 113 S.Ct. at 2810. The court noted that Congress has chosen to link forfeiture directly to the commission of drug offenses. Austin acknowledges the historical understanding of forfeiture as punishment. 113 S.Ct. at 2812.

Any doubt that the Austin analysis of what constitutes punishment applies as well under the Double Jeopardy Clause was made clear by the Supreme Court in Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994). "A defendant convicted and punished for an offense may not have a non-remedial civil penalty imposed against him for the same offense in a separate proceeding." Id. at 1945.

The principles set forth in Austin lead to the conclusion in the instant case that the statutes relied upon by the government operate to punish and deter notwithstanding any remedial purpose that may be served. The government forfeited the U.S. Currency, placer gold and watch under 21 U.S.C. § 881(a)(6). This section provides:

> "(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate

> any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

The firearms were forfeited under 21 U.S.C. § 881(a)(11) which provides in pertinent part:

> "Any firearm (as defined in § 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property."

Authority for administrative forfeiture of the items pursuant to 21 U.S.C. § 881 is found at 19 U.S.C. § 1609. These forfeitures have the same force and effect as a contested civil judicial forfeiture. 19 U.S.C. § 1609(b). A contested trial is not necessary. See Kurth Ranch, 114 S.Ct. at 1492.

It is clear that jeopardy is complete when a judgment is entered. Id. at 1942. No judgment has been tendered in Case No. A94-401 Civil seeking the forfeiture of the four airplanes. Because the administrative forfeitures "resulted in punishment" it is unnecessary for the court to determine whether jeopardy has attached in Case No. A94-401 Civil, the civil forfeiture action against the airplanes.[4] It is likewise unnecessary to address Plunk's contention that the government purposely instituted the forfeiture proceedings to gain advantage by "splitting" the prosecution of Plunk into the civil punishment proceedings and criminal punishment proceedings.

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[4] Plunk contends that the mere filing of a forfeiture claim impacts his Fifth Amendment privileges and thereby constitutes jeopardy.

CONCLUSION

The administrative forfeitures of Plunk's Rolex watch, currency, placer gold and nine (9) firearms constitute "punishment" in a separate proceeding for double jeopardy purposes. Under Ninth Circuit law this court must conclude that the legislative history of the relevant statutes allowing the forfeitures show a Congressional intent to punish and deter, and they do not serve solely a remedial purpose.

The development of law in this area has arguably led to unintended results in the administration of justice. This court is bound to follow the Ninth Circuit law. It is up to the Supreme Court and Congress to provide clear direction in this quagmire. Accordingly, it is recommended that Defendant Plunk's Motion to Dismiss the Indictment on Grounds of Double Jeopardy be Granted.

DATED this 4th day of November, 1994, at Anchorage, Alaska.

/S/

JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the close of business on **NOVEMBER 9, 1994**. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). Objections and responses shall not exceed five (5) pages in length, and shall not merely reargue positions presented in motion papers. Rather,

objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **NOVEMBER 14, 1994**. The parties shall otherwise comply with provisions of Local Rule 12 (C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

FILED
DEC 14 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, Cross-Appellee, vs. GERALD FRANK PLUNK, Defendant-Appellee, Cross-Appellant.	NOS. 94-30421 94-30422 D.C. No. CR-94- 036-01-JWS

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

The panel has voted to deny cross-appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The cross-appellant's Emergency Motion Under Circuit Rule 27-3 is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 94-30421 & 94-30422
CT/AG#: CR-94-036-01-JWS

UNITED STATES OF AMERICA

Plaintiff/Appellant-
Cross-Appellee

v.

GERALD FRANK PLUNK

Defendant/Appellee-
Cross-Appellant

FILED
DEC 29 1995
UNITED STATES
DISTRICT COURT
DISTRICT OF ALASKA
/S/
_____, Deputy

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED in part, DISMISSED in part.

Filed and entered October 17, 1995.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

DEC 22 1995

b y : /S/
Deputy Clerk

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

United States Constitution:

Art. III, § 2, Cl. 1. Jurisdiction. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Fourth Amendment. Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statutes:

18 U.S.C. § 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

19 U.S.C. § 1607. Seizure; value $500,000 or less, prohibited articles, transporting conveyances, monetary instruments

(a) Notice of seizure. If—

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(b) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of title 31 of the United States Code;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be

published for at least three successive weeks in such a manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) Definition of "controlled substance". As used in this section, the term "controlled substance" has the meaning given that term in section 102 of the Controlled Substances Act [21 USCS § 802].

19 U.S.C. § 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1609. Seizure; summary forfeiture and sale

(a) In general. If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at

public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 613 [19 USCS § 1613], into the Customs Forfeiture Fund.

(b) Effect. A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to subsection O of section 30 of the Ship Mortgage Act, 1920 (46 U.S.C. App. 961) or any corresponding revision, consolidation, and enactment of such subsection in title 46, United States Code) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

21 U.S.C. § 881. Forfeitures

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act [21 USCS § 857]).

(11) Any firearm (as defined in section 921 of title 18, United States Code) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules of Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules of Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General. Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable. The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs

officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property. (1) Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

* * *

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code, or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

[(k)](l) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. ... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives or ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, is derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendants is an individual or $5,000,000 if the defendant is other than an individual, or both. ... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

21 U.S.C. § 843. Prohibited acts C

Unlawful acts

* * *

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * *

Penalties

(d) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

* * *

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

* * *

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036 CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA	)	
	)	ss.
THIRD JUDICIAL DISTRICT	)	

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I voluntarily surrendered myself in the instant criminal matter on or about March 25, 1994 and was arrested.

2. At the time of my arrest I was wearing a Rolex watch which, upon information and belief, is the

watch the subject of Seizure No. 152090, Case No. RG940002.

3. I was initially told by the marshals that I could remove my watch and give it to my attorney, Mr. Bryson.

4. The watch was then taken by a DEA agent.

5. After repeated inquiries by me and/or my attorney concerning said watch, I received notice of administrative forfeiture of the watch.

6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold and guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I am the defendant in United States v. Plunk, Case No. A94-036 (JWS).

2. I am tendering this affidavit in support of my Motion to Bar Further Prosecution on the Grounds of Double Jeopardy.

3. By tendering this affidavit, I do not intend to make any limited or general waiver of my right to remain silent or against self-incrimination under the United

States constitution or my rights to confidentiality of attorney/client communications.

4. It is my knowledge and belief that pursuant to the search warrant executed on my personal residence at 14940 Longbow Drive, Anchorage, Alaska, nine firearms were seized.

5. I obtained the following seized firearms from individuals who the government has informed me are cooperating witnesses in the case against me:

a. Ruger 22 mm: gift from David Nova.

b. Colt 45: purchased from Hal Booher.

6. I purchased the Wilding 475 pistol through my son-in-law, Michael Frizzell.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036 CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT PLUNK'S MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA	)	
	)	ss.
THIRD JUDICIAL DISTRICT	)	

PHILLIP PAUL WEIDNER, being first duly sworn under oath, deposes and states:

1. I am the attorney of record for the defendant Gerald Frank Plunk in the instant matter.

2. This affidavit is submitted in support of the defendant's pending Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy/Notice of Objection on Double Jeopardy Grounds to Further

Proceedings and/or Jury Trial, and is not intended or made as any limited or general waiver of his rights to remain silent and against self-incrimination under the United States Constitution, or his rights to confidentiality of attorney/client privileges under same.

3. I was Mr. Plunk's attorney of record at the time of the return of the superseding indictment herein, and further, his attorney of record at the time of two detention hearings, and further, reviewed a transcript of the initial detention hearing held when Mr. Plunk was previously represented by William P. Bryson.

4. I was attorney of record for Mr. Plunk in the instant matter when he was served with and brought to my attention notice of seizures in Seizure Nos. 1521831, 152199, and 152824 relating to items allegedly seized from his alleged residence at 14940 Long Bow Drive, Anchorage, Alaska at the time of service of a search warrant herein.

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food saving" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112), and further based upon my understanding that the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard

to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Phillip Paul Weidner

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: 7/25/97

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, 3 SMALL PLASTIC BAGS
ID#:
VALUE: $967.89
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK
SEIZED FROM: PLUNK, GERALD FRANK, INMATE
JUDICIAL DIST: ALASKA

DATE:
AUGUST 19, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY
ID#:
VALUE: $9660.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK, INMATE NO.:
SEIZED FROM: PLUNK, GERALD FRANK
JUDICIAL DIST: ALASKA

DATE:
JUNE 24, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS
ID#:
VALUE: $4040.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK INMATE #760
JUDICIAL DIST: ALASKA

DATE:
JUNE 10, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 9 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 242

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: ROLEX WRIST WATCH, ROLEX OYSTER
ID#:
VALUE: $1500.00
SEIZURE DATE: 25 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK (INMATE #7603)
JUDICIAL DIST: ALASKA

DATE:
JUNE 3, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 241

DEA.294 (MAR.92)

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY

VALUE: $9660.00
SEIZURE DATE: 94 MAR 24 152199
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER: *
JUDICIAL DIST: ALASKA
BOND REQUIRED: $966 152199
DATE OF THIS LETTER: 09 MAY 94
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152199B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under

certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA

field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, VALUE: $967.89

VALUE: $967.89
SEIZURE DATE: 94 MAR 24 152824B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 09 MAY 94 152824B
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152824B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under

certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

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field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS, VALUE: $4,040.00

VALUE: $4040.00
SEIZURE DATE: 94 MAR 24 152183B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $404
DATE OF THIS LETTER: 25 APR 94 152183B
DATE OF FIRST PUBLICATION: 94 MAY 04

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152183B

NOTICE OF SEIZURE

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seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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TO CONTEST THE FORFEITURE

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U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: 1 ROLEX WRIST WATCH, VALUE: $1,500.00
SERIAL'S #9378785, #168000
VALUE: $1500.00
SEIZURE DATE: 94 MAR 25 152090B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 18 APR 94 152090B
DATE OF FIRST PUBLICATION: 94 APR 27

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152090B

NOTICE OF SEIZURE

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ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Apr 26 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By ____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	) **COUNT 1**
	) **CONSPIRACY TO**
vs.	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK, aka "FRANK", aka "EL FEO" AND TIMOTHY PIERSON, aka "TIM" aka "MR. T."	) Vio. Title 21 U.S.C. §841(a)(1) and 846
	)
	) **COUNT 2**
	) **CONTINUING**
	) **CRIMINAL**
Defendants.	) **ENTERPRISE**
	) Vio. Title 21 U.S.C. §848
	COUNT 3-8 **USE OF COMMUNICATION FACILITY** Vio. Title 21 U.S.C. § 843(b)

COUNT 9-11
POSSESSION WITH INTENT TO DISTRIBUTE
Vio. Title 21 U.S.C. § 841(a)(1)

COUNT 12
CONSPIRACY TO DISTRIBUTE COCAINE
Vio. Title 21 U.S.C. § 846 and 841(a)(1)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
aka "FRANK"
aka EL FEO
AND
TIMOTHY PIERSON
aka "TIM"
aka "MR. T."

the defendants herein, and other persons whose names are known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to commit offenses against the United States, that is to distribute in excess of 2000 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A. **OBJECTIVES OF THE ORGANIZATION**

1. One objective of the organization was the possession of controlled substances (cocaine) with the intent to distribute the cocaine within the United States.

2. Another objective of the organization was the transportation of loads of cocaine from the Los Angeles, California and the Houston, Texas areas to New Jersey on behalf of the Colombian Cali Cartel.

3. The primary objective of the organization was the distribution of multi-kilogram loads of cocaine for financial gain.

B. **THE PARTICIPANTS IN THE ORGANIZATION**

The organization consisted of numerous individuals aligned in various sub-groups all working toward the common objective of distributing cocaine for financial gain.

1. JACO, aka EL COMPADRE, a Colombian National living in Colombia was the principal organizer, supervisor and manager of the organization. His job was the transportation of cocaine into the United States and the ultimate supervision of the distribution of the cocaine throughout the United States.

2. LEON ALBERTO MALCA, aka JAMES, aka RICKI (hereinafter JAMES) (charged elsewhere) was a principal supervisor in New York who coordinated the Colombian and North American distribution of multi-kilo loads of cocaine.

3. GERALD FRANK PLUNK, aka FRANK, aka FEO, (hereinafter PLUNK) was the principal organizer, supervisor and manager of the interstate transportation of multi-kilo loads of cocaine. He was responsible for establishing a transportation network from the Southern borders of the United States to the New Jersey area.

4. JOHN TIMOTHY PIERSON, aka MR. T., (hereinafter PIERSON) was initially a driver for PLUNK but later became responsible for the transportation network when law enforcement began investigating PLUNK.

5. Tony, aka, Alphonse, supervised the storage of cocaine in Los Angles [sic], California.

6. CARLOS ANDRES SERRATO (charged elsewhere) and MIGUEL ANGEL VILLALKA (charged elsewhere) delivered vehicles loaded with cocaine to predesignated locations to be off-loaded by the drivers initiating their cross-country travel.

7. ELBA DUENAS, aka ERICA (charged elsewhere) delivered empty vehicles from New York to predesignated locations in New Jersey to enable cross-country drivers to off-load their cocaine shipments into the vehicles. She sometimes delivered cocaine proceeds to BARRY TENDLER.

8. BARRY TENDLER aka THE BEAR, (charged elsewhere) assisted PLUNK in the delivery of cocaine to drivers in Los Angeles and participated in the distribution of payments to the drivers and the receipt of drug proceeds.

9. HAL BOOHER aka PANCHO (charged elsewhere) was an interstate driver who utilized a trailer and a motorhome to transport approximately 1225 kilos of cocaine between Los Angeles, Houston, and New Jersey.

10. CISCO and D.D., unindicted co-conspirators, were interstate drivers hired by PLUNK to transport approximately 1775 kilos of cocaine from Los Angeles and Houston to New Jersey, utilizing motorhomes and trucks.

C. **METHODS AND MEANS**

1. It was a part of the conspiracy that the participants of the organization employed code names, and communicated by code through the use of Sky Talk and Sky Page and cellular phones to avoid detection by law enforcement as they communicated their cocaine transportation messages.

2. It was a part of the conspiracy to use recreational-type vehicles to transport kilo loads of cocaine across country.

3. It was a part of the conspiracy that PLUNK would provide the currency to purchase the vehicles used for transporting cocaine.

4. It was a further part of the conspiracy to disguise the true nature of cross-country trips by having the drivers pass out brochures and video tapes describing

defendant PLUNK's "BIG MOUNTAIN LODGE" located near Illiamna, Alaska.

5. It was a part of the conspiracy that after being told where to begin the journey, the drivers would load boxes or duffel bags of cocaine into waiting vehicles and travel across the United States to New Jersey.

6. It was a part of the conspiracy that upon arrival in New Jersey, drivers were notified that certain empty vehicles were waiting to be filled with the cocaine.

7. It was a further part of the conspiracy that throughout the journey and upon its completion, the drivers communicated by telephone and pager with defendant PLUNK who informed James of their progress.

8. It was a part of the conspiracy that El Compadre in Colombia would speak directly to James about the transactions, and that James would repeat portions of their conversations to PLUNK and that James would repeat similar conversations of PLUNK's to El Compadre.

9. It was a part of the conspiracy that PLUNK would purchase commercial heat sealing machines through BIG MOUNTAIN LODGE and distribute them to the Colombians for the purpose of packaging proceeds (cash) from the distribution of cocaine.

10. It was a further part of the conspiracy that PLUNK would often pay drivers with vacuum packed envelopes of cash.

11. It was further part of the conspiracy that defendant PIERSON was to assume the role of transportation supervisor of the cocaine distribution when James and PLUNK feared the police were investigating PLUNK.

12. Finally, it was a part of the conspiracy that drivers were instructed how to avoid detection on their cross-country trips and instructed that they would be provided a "family doctor" (signifying a lawyer) in the event they were arrested.

D. **OVERT ACTS**

In furtherance of the conspiracy and to achieve the objects thereof the following over [sic] acts were committed:

1. On or about the first week of April 1993, PLUNK travelled [sic] to South America to meet with

members of the Cali Cartel to discuss transporting cocaine into Alaska as well as across the United States.

2. On or about April 15, 1993, PLUNK traveled to Seattle, Washington to hire a driver to transport cocaine.

3. On or about April 26, 1993, PLUNK purchased a motorhome in Eagle River, Alaska for the purpose of transporting cocaine.

4. On or about June 4, 1993, PLUNK and Tendler arrived in Los Angeles to assist in loading approximately 174 kilos of cocaine into a motorhome which was destined for New Jersey.

5. In or around early July, PLUNK directed Cisco, and Pancho to transport cocaine from Los Angeles to New Jersey.

6. On or about August 21, 1993, PLUNK directed an unindicted co-conspirator to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

7. On or about mid-September, PLUNK arranged for the transfer of ownership of a load vehicle used for transporting cocaine.

8. In or around early September, PLUNK directed Cisco to transport cocaine from Houston, Texas to New Jersey.

9. On or about October, 1993, PLUNK directed Pancho to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

10. In or around the middle of October, PLUNK directed Cisco to transport cocaine from Los Angeles to New Jersey.

11. In late October, PLUNK directed the transportation of approximately 100 kilos of cocaine from Los Angeles to New Jersey.

12. On or around Thanksgiving 1993, PLUNK directed Cisco, to transport a load of cocaine from Los Angeles to New Jersey in a Winnebago Motorhome.

13. On December 7, 1993, James telephoned PLUNK in Alaska to discuss Pancho's upcoming cocaine delivery as well as a delivery by defendant PIERSON.

14. On December 7, 1993, James telephoned Tony in California to discuss PLUNK and Pancho's upcoming arrival in Los Angeles.

15. On December 7, 1993 James telephoned Colombia to discuss "Panchito's" arrival.

16. On December 12, 1993, Pancho was arrested delivering 220 kilograms of cocaine to New Jersey.

17. On December 12, 1993, James telephoned Tony in Los Angeles and El Compadre in Colombia with news of Pancho's arrest.

18. On December 12, 1993, James telephoned PLUNK and discussed Pancho's arrest and discussed getting a lawyer for him.

19. On December 18, 1993, James telephoned Tendler to discuss Pancho's knowledge of the organization and getting a lawyer for him.

20. On December 18, 1993, James telephoned defendant PIERSON to discuss various locations for distributing cocaine, describing the organization to be like American Express . . . "everywhere".

All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

A. Beginning at a time unknown to the Grand Jury, but no later than April 1993, and continuing thereafter up to and including December 1993, in the State and Federal District of Alaska, and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly, intentionally, and unlawfully engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 846, 841(a)(1) and 843(b), which violations, among others, were part of a continuing series of violations, included but not limited to, the following:

1. Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

Defendant herein, did willfully and knowingly combine, conspire and agree with others whose names are known or unknown to the Grand Jury to distribute in excess of two thousand kilograms of cocaine and to possess with intent to distribute cocaine, as alleged in Count One of this Indictment, which is incorporated in full herein;

2. On or about June 4, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 174 kilograms of cocaine, as alleged in Count 9 of this Indictment, which is incorporated in full herein;

3. On or about July, 1993, in the State and Federal District of Alaska, defendant PLUNK did knowingly and intentionally distribute approximately 350 kilograms of cocaine.

4. On or about August 21, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 200 kilograms of cocaine as alleged in Count 10 of this Indictment which is incorporated in full herein;

5. On or about December 12, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 220 kilograms of cocaine as alleged in Count 11 of this Indictment which is incorporated in full herein;

6. On or about December 7, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 3 of this Indictment, which is incorporated in full herein;

7. On or about December 5, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 4 of this Indictment, which is incorporated in full herein;

8. On or about December 8, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 5 of this Indictment, which is incorporated in full herein;

9. On or about December 11, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities, as alleged in Count 6 of this Indictment, which is incorporated in full herein;

Which series of violations were undertaken by defendant PLUNK in concert with at least five other persons with respect to whom defendant PLUNK occupied a position of organizer, a supervisory position, and other positions of management, and from which continuing series of violations defendant PLUNK obtained substantial income and resources.

B. **THE FORFEITURE PROVISIONS**

Through the above-mentioned continuing criminal enterprise, defendant

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

his nominees, assignees, agents and those in active concert and participation with him did directly and indirectly obtain substantial profits, proceeds and resources from said criminal enterprise, which shall be forfeited to the United States of America pursuant to the provisions of Title 21 U.S.C. § 853(a)(3) and which shall include all property constituting or derived from any proceeds obtained, directly or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substances violations as well as any interest in, claims against, and property or contractual rights affording said defendants a source of influence or control over the continuing criminal enterprise, including but not limited to the property described below:

1. ONE heat sealed bag of currency seized at 14940 Longbow Drive, Anchorage, Alaska on March 24, 1993 [sic], DEA Evidence number N-112.

2. Residence located at 14940 Longbow Drive, Anchorage, Alaska (Timberlux Subdivision #3, Block F, Lot 3).

3. Cabin with acreage more fully described as: T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182.

4. 4.99 acres of unimproved real property, T27NR4W, Section 22, Alaska Land Survey No. 77-91, Tract A (Chase Area) MATSU Borough, Alaska.

5. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska,

a. Lot 2 Block 1
b. Lot 10 Block 1
c. Lot 11 Block 1
d. Lot 7 Block 5
e. Lot 8 Block 5
f. Lot 5 Block 6
g. Lot 6 Block 6
h. Lot 7 Block 6

6. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska.

7. Real property located at Tract B, Lot 3 #66, Sky Harbor Estates, Anchorage, Alaska.

8. Big Mountain Lodge, Igiugig, Alaska more particularly described as Lease Number 92-L-02, a portion of Lot 3, U.S. Survey 7982, Native Allotment AA-6277, located near Igiugig, Alaska, located in the Kvichak Recording District, State of Alaska, containing 14.057 acres.

If any of the properties described above as being subject to forfeiture pursuant to Title 21 United States Code, Section 853, as a result of any act or omission of the defendants —

a. cannot be located upon the exercise of due diligence;
b. has been transferred to, sold to, or deposited with a third party;
c. has been placed beyond the jurisdiction of this court;
d. has been substantially diminished in value; or
e. has been commingled with other properties that cannot be subdivided without difficulty;

it is the intent of the United States of America, pursuant to Title 21, United State [sic] Code, Section § 853(p), to seek

forfeiture of any properties of the defendants up to the value of the properties listed above as subject to forfeiture.

All pursuant to Title 21, United States Code, Section 853 and 848.

COUNT 3

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 7, 1993, at approximately 7:49 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offense to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 4

THE GRAND JURY CHARGES THAT:

On or about December 5, 1993, at approximately 11:59 AM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 5

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 8, 1993, at approximately 3:43 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 6

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 11, 1993, at approximately 4:03 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. §846 and the distribution of cocaine, in violation of Title 21 U.S.C. §841(a)(1);
All in violation of Title 21 U.S.C. §843(b).

COUNT 7

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 15, 1993, at approximately 3:33 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON

AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 8

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 18, 1993, at approximately 1:03 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 9

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 4, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 174 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21, U.S.C. § 841(a)(1).

COUNT 10

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 21, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 200 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 11

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 12, 1993, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 220 kilograms of cocaine, a Schedule II Controlled Substance in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES THAT:

Between on or about the Fall of 1980, until December 31, 1993,

GERALD FRANK PLUNK

defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance. One primary objective of the organization was the receipt of kilogram

quantities of cocaine from Florida. The primary objective of the organization was to provide quantities of cocaine to local (Alaskan) drug traffickers for financial gain. All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/S/
PRESIDING GRAND JUROR

/s/ Karen L. Loeffler
for ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY
ORGANIZED CRIME DRUG ENFORCEMENT
TASK FORCE

4/26/94
DATE

ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney

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FILED
Mar 23 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	)
	) **COUNT 1**
vs.	) **CONSPIRACY TO**
	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK,	) Vio. Title 21 U.S.C.
	) § 841(a)(1) and 846
Defendant.	)

INDICTMENT

THE GRANT JURY CHARGES THAT:

COUNT 1

Between on or about the Fall of 1987, until no later than April, 1991, the exact dates of which are unknown,

GERALD FRANK PLUNK

the defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the

United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/s/
PRESIDING GRAND JUROR

/s/ Robert C. Bundy
ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY

3/22/94
DATE

AFFIDAVIT OF SPECIAL AGENT ROBERT E. CAYFORD

I, Robert E. Cayford, being duly sworn, hereby depose and say as follows:

INTRODUCTION

1. I am a Special Agent with the United States Drug Enforcement Administration (DEA) and have been so employed for the past eleven (11) years. I am vested with the authority to investigate violations of federal law, including Title 21, United States Code. In the course of my employment I have attended schools regarding the financial methods utilized by drug traffickers. In addition, during my eleven (11) years with DEA, I have assisted and served as the case agent on numerous drug investigations and have assisted or prepared search warrants regarding drug investigations. Upon my oath, I state that I believe the following facts to be true based on my training and experience in regard to narcotic investigations:

2. That drug trafficking is a continuous pattern of illegal substance distribution and not just a single event;

3. That drug traffickers very often place assets in the name of others to avoid detection by government agencies, and that drug manufacturers often utilize fictitious company names in an attempt to give a legitimate appearance to the purchase of items necessary for the production of controlled dangerous substances;

4. That even though these assets are in other person's names, the drug dealers continue to use these assets and exercise dominion and control over them;

5. That drug traffickers often maintain on hand large amounts of U.S. Currency in order to maintain and finance their ongoing narcotics business;

6. That individuals involved in drug trafficking profit from the sale of controlled substances and attempt to legitimize (launder) those profits. I know that to accomplish this task, these individuals often use false and fictitious records, passports, birth certificates, accounts in foreign and domestic banks, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations, and business fronts. These individuals often transfer real and personal property to third persons or purchase same in other people's names;

7. That drug traffickers maintain books, computers, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, sale and distribution of controlled substances;

8. That the aforementioned books, computers, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them;

9. That it is common for drug traffickers to secret contraband, proceeds of drug sales, and records of drug transactions in secure locations, within their residence, vehicles, commercial storage units, safe deposit boxes, and businesses for ready access and to conceal them from law enforcement authorities;

10. That persons involved in drug trafficking often conceal in their residences caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry and other items of value and/or proceeds of drug transactions relating to obtaining, transferring, secreting or spending of large sums of money made from engaging in narcotics trafficking activities;

11. That drug traffickers commonly maintain addresses and telephone numbers in books or papers which reflect names, addresses and telephone numbers for their associates in the trafficking organization;

12. That drug traffickers take or cause to be taken photographs of them, their associates, their property, and their products;

13. That drug traffickers usually keep paraphernalia for packaging, cutting, weighing and distributing the drugs. That these paraphernalia include but, are not limited to, scales, plastic bags and cutting agents;

14. That drug traffickers frequently utilize alias names during every step of the drug trafficking operation, as well as using other individuals to carry out the means of drug trafficking;

15. I knew that in United States v. Hernandez-Escargega [sic], 886 F.2d 1560, 1567 (9th Cir. 1989) and United States v. Fannin, 817 F. 2d [sic] 1379, 1381-82 (9th Cir. 1987), the Court of Appeals held that in the case of drug traffickers, evidence is likely to be found where dealers live and a search warrant may be properly issued against a suspected drug dealer's residence despite the lack of direct evidence of criminal activity at the residence.

BACKGROUND

1. On July 9, 1992, Warren Jeff Funderburk was debriefed by DEA, Anchorage, pursuant to a plea agreement in which Funderburk and his wife, Kim, pled guilty to cocaine trafficking. Warren Jeff Funderburk identified Frank Plunk as his source of supply for kilogram quantities of cocaine between the Fall 1988 and the Spring 1990. Funderburk claimed that he made 10 to 15 one kilogram purchases from Plunk during that period of time. Funderburk was a guest of Frank Plunk at his (Frank Plunk's)" [sic] Big Mountain Lodge" near Lake Iliamna, Alaska during that time.

2. On March 18, 1994, a Source of Information (SOI) was interviewed by DEA, Anchorage. This SOI admitted to being the facilitator of cocaine transactions between Frank Plunk and Warren Jeff Funderburk. The SOI would pick up money from Funderburk and deliver it to Frank Plunk at his

(Plunk's) residence on Long Bow Drive, Anchorage, Alaska. Plunk would give the cocaine to the SOI at the time the money was delivered. The SOI would then deliver the cocaine to Funderburk at his residence.

3. On December 12, 1993, Hal Booher was arrested by DEA following the seizure of approximately 220 kilograms of cocaine from Booher's motorhome which Booher was driving in New Jersey. Booher was charged with Conspiracy and Possession with Intent to Distribute Cocaine in the Federal District of New Jersey.

4. Hal Booher agreed to cooperate with DEA following his arrest. Booher provided the following background information relating to his cocaine transporting activities:

A) About April 1993, Hal Booher was recruited by Gerald Frank Plunk to transport cocaine from Los Angeles, California or Houston, Texas to New Jersey. Plunk told Booher that he (Booher) would earn $20,000 to $30,000 per load. Plunk indicated that he already had other driver(s) transporting cocaine for him.

B) About August 1993, Gerald Frank Plunk sent Booher $17,000.00 U.S. Currency via Federal Express or United Parcel Service (UPS). The money was to be used by Booher to purchase a recreational vehicle for transporting cocaine. The money was a verbal loan from Plunk to Booher.

C) Between August 1993 and December 1993, Booher admitted that he transported seven or eight loads for Plunk. Each load was about the same size, 200-220 kilograms.

D) Hal Booher became acquainted with Gerald Frank Plunk in Alaska in about November 1983. Booher became aware that Plunk distributed cocaine in the Anchorage, Alaska area. Booher stated that Plunk has a desk top computer at his (Plunk) home on Long Bow Drive, Anchorage, Alaska and that Plunk often coordinated cocaine transportation from his home telephone.

5. On March 11, 1993, a Source of Information (SOI) was interviewed by DEA, Anchorage, about SOI's knowledge of Gerald Frank Plunk. SOI stated that Plunk supplied him/her with cocaine on an average of three times per week during 1989 and 1990. SOI obtained the cocaine on numerous occasions from Plunk at Plunk's home located at 14940 Long Bow Drive, Anchorage, Alaska.

6. Based on the preceding information and the eleven (11) years of experience I have in the field of drug investigations, I believe Gerald Frank Plunk to be conducting a commercial cocaine distribution enterprise from his residence located at 14940 Long Bow Drive, Anchorage, Alaska. I also believe that he has stored cocaine at his residence for approximately nine years and that there is evidence at the residence which will include cocaine, weighing, and packaging materials, currency and other assets and proceeds derived from the illicit trafficking of cocaine, business records showing purchase and sales and financial records showing proceeds and disposition of proceeds which are ill-gotten gains of the sale of cocaine. I believe there is evidence at the residence relating to transporting large shipments of cocaine across the United States.

Further your affiant sayeth naught.

/S/

Robert E. Cayford, Special Agent, Drug Enforcement Administration

Subscribed and Sworn to Before me this 22nd day of March 1994 at Anchorage, Alaska.

/S/

U.S. Magistrate Judge